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VOLUMES I TO XII PREPARED UNDER THE
EDITORIAL SUPERVISION OF

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AND

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AMERICAN LAW AND PROCEDURE

VOLUME VIII.

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PARTNERSHIP

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PUBLIC SERVICE CORPORATIONS AND CARRIERS

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CHAPTER I.

NATURE OF A PARTNERSHIP.

§ 1. **Definition of partnership.** A partnership is an association of two or more persons for the purpose of carrying on a business together and dividing the profits (1).

§ 2. **Essential characteristic of a partnership. Test of profit-sharing.** What constitutes the essential distinguishing feature of a partnership is a question about which

(1) This is in substance the definition given in Beale's edition of Parsons on Partnership (4th ed.) p. 1, and is adopted in the codes of several states: Cal. Civil Code, § 2395; Mont. Rev. Civ. Code of 1907, § 5466; N. Dak. Rev. Civ. Code of 1905, § 5818; S. Dak. Civ. Code of 1903, § 1723. Many other definitions are given in Lindley on Partnership (2d ed.), 2-4.

courts and text writers have been much at odds. The earliest cases held that the test whether a man was a partner was whether he actually shared in the profits. But a man employed as a clerk may receive a salary and a commission on profits without becoming a partner (2), and there are other instances where participation in profits does not make the participant subject to the duties and liabilities of a partner. Suppose that the firm of Smith & Jones becomes insolvent, and the partners make a compromise with the creditors, by which they turn over the firm property to trustees whom the creditors appoint. The trustees are to manage the business and divide the net income among the creditors till their claims are paid, and then restore the property to Smith & Jones. It is provided that the income is to be regarded always as the property of the firm. Subsequently a person sells goods to the trustees and is not paid. Can he hold the creditors liable for his bill, on the ground that by sharing in the profits they have become liable as the partners? This was the famous English case of Cox v. Hickman (2a), decided in 1860. It was held that the creditors were not liable, because sharing in the profits of a business does not necessarily make one liable as a partner. The right to share in profits is not the conclusive test of partnership. A broker working on commission, or a sailor on shares, obviously is not a partner.

§ 3. Same: Test of mutual agency. Partners are

(2) Rawlinson v. Clarke, 15 M. & W. 292; Stocker v. Brockelbank, 3 MacN & G. 250.

(2a) 8 H. L. Cas. 268.

almost invariably mutual agents: each is authorized to act for the others, and each is responsible for the others' acts, within the scope of the business of the firm. It has been stated as law by some courts and writers of legal text-books that the test whether a partnership exists is whether this mutual agency has been created (3). But it has been pointed out that to say this is putting the cart before the horse, since the mutual agency exists because of the partnership, not the partnership because of the mutual agency. The case of Cox v. Hickman was at first understood as establishing the test of mutual agency; but it is not now so regarded (4). Besides, persons may often be mutual agents without a partnership existing. Thus persons who are owners in common of property, or who are associated in a small social or fraternal organization, may all be authorized to act for each other, without being in partnership. Conversely, a partnership may sometimes exist without the partners being authorized to act for each other as agents. Such mutual agency almost always exists. But it may be expressly provided in the partnership articles that one of the signers, although a partner, owning his share of the profits, shall have no power to participate in the partnership business, or to do any act in behalf of the others.

§ 4. **Same: Test of common ownership.** Some writers have thought that the test of partnership was the existence of a community of interest in certain property (5).

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(3) Jernee v. Simonson, 58 N. J. Eq., 282, 288; 1 Bates, Partnership, § 18.

(4) See Pooley v. Driver, 5 Ch. D. 458, 474-6; Mechan v. Valentine 145 U. S. 611, 622.

(5) See James Parsons, Principles of Partnership, § 57.

But while mutual ownership of property is a usual feature of a partnership, it may exist where there is no partnership relation; and, on the other hand, it is conceivable that a partnership of services might exist where there was no common ownership of any property, in the ordinary sense of the word.

§ 5. **Same: Conclusion.** The conclusion reached by the best recent authorities is that whether an association constitutes a partnership depends on the intention of the members at the time when the association was formed. The question is whether they intend to enter into the relation of partners (6): that is, to form an association for the purpose of carrying on a business together as joint principals, and dividing the profits. This may seem, at first sight, inconsistent with the former statement that the sharing of profits is not the sole test. But the rule is, that, in determining whether the association or relation is a partnership, the test whether a man is a partner is, not whether he has actually received a share of the profits, but whether he has entered into an association formed for the purpose of carrying on a business and dividing the profits. The fact that a person shares in the profits, or that a mutual agency of the members is created, or that the members have a community of interest in certain property, or that each has a right to an accounting from the others, is simply a circumstance that tends strongly to show that the parties meant to enter into the relation of partners.

(6) Parsons on Partnership (4th ed.) 47. § 54; Burdick on Partnership (2d ed.), 57.

§ 6. **What definition implies: Mutual consent.** To have a partnership there must be an association. This implies that there must be an intentional association. The relation is created by the agreement of the parties, and cannot exist without their mutual consent. Persons may however be liable as partners who have not intended to form a partnership. In some states (though not all) persons who have intended to form a corporation, but have failed to comply with the legal requirements, if they proceed to carry on business, are held liable as if they were partners. And a person who allows himself to be held out as a partner by the members of an existing firm may be held liable as a partner, on the ground that, as to third persons, he has estopped himself from denying that he is one. But, in all such cases, the person is not held liable on the ground that he is a partner, because as to him there is no partnership really existing; he is held liable to the same extent as if he were a partner (7).

§ 7. **Same: Plurality of persons.** It implies also that there must be more than one person. If Jones and Smith form a partnership to do business under the name of Smith & Jones, and Jones dies, but Smith continues to carry on the business under the same name, the business is not a partnership any longer. The situation is now the same as if Smith were trading alone under the name of "Thomas E. Jones & Co." or "John S. Robinson" or "Smith & Company" or "The National Wire Works." Such names are frequently assumed or continued in use, but there is no partnership when the business is all in

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(7) See Mechem, Elements of Partnership, § 3.

the hands of one man. In some states the right of a person to do business under another name than his own is restricted by statute, and in many states an individual or firm is forbidden to use a name that looks like the name of a corporation.

§ 8. **Same: Purpose of doing business for share of profits.** The association must have been formed for the purpose of carrying on a business together. If Smith, Jones, Brown, and Robinson make arrangements for a joint trip to Europe for pleasure, or organize themselves into an association of amateur photographers, the relation thus formed is not a partnership relation. Hence an association to maintain a hose company for the public benefit is not a partnership (8). But the members of such an association, although not partners, may be liable for debts contracted in their behalf by their authorized agent, or by one of the members in behalf of the others, or for injuries caused by an agent or employee while acting within the scope of his duties. This however depends on principles of agency, and not on the law of partnership. If several persons unite in sending a vessel to China with a cargo to be sold for their mutual profit, they are partners in this venture, though their regular businesses may be entirely distinct. With the exception of certain rarely possible cases, the association, to be a partnership, must have been formed for the purpose of sharing profits. While the sharing of profits does not necessarily make a man a partner, it is almost universally

(8) Thomas v. Ellmaker, 1 Pars. Eq. (Pa.) 98, 111.

true that he is not a partner unless he is entitled to share in the profits (9).

§ 9. **Determination of existence of partnership: Written agreements and acts.** It was stated in § 5, above, that the test whether a partnership exists is what was the intention of the parties at the time when they entered into their business relations. How is that intention to be ascertained? What their intention was is a question for the court or jury to determine. If the question arises whether two or more persons, who appear to have been jointly interested in a business transaction without organizing any formal partnership, were really partners or not, this must be answered by ascertaining, as well as possible, what was their intention at the time they entered upon this transaction. In determining this question the court or jury will consider whether the parties agreed to share in the profits; whether they meant to become agents for each other, with authority in each to bind the others; whether they were to have the common ownership of some joint property or fund; and whether they have signed any papers or made any admissions tending to show that they intended to be partners.

If the parties have signed a written agreement, it is from this that their intention must be ascertained. If not, then their intention is to be determined from the evidence of their acts and statements. If A hires a hotel of B, and C sells goods to A, but his bill is not paid; and C then seeks to hold B liable for this debt contracted by A, on the ground that B is A's partner, and B says there

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(9) Sailors v. Nixon Jones Co., 20 Ill. App. 509, 513.

was no partnership between them, the question whether there was a partnership depends on what they intended at the time of the hiring. If it was not intended that A should have authority to act for B, or that A and B should share in profits or losses, or be joint owners of the hotel, there is no evidence of a partnership. But if it was intended that A and B should run the hotel on joint account, sharing profits and losses, with authority to act in each other's behalf, then there would be evidence of a partnership, even if they both signed a paper saying that they were not to be partners (10).

§ 10. **Same: Inconsistent evidence.** On the other hand, if A, B, and C agree in writing that they will form a partnership to do business as a commercial agency, each owning one-third of the office furniture and supplies; but, during the first two years, A shall not take part in the business or share the profits or losses. A is not a partner during the first two years. The use of the word "partnership" in the written agreement does not necessarily make them partners, even though they thought they were all becoming partners immediately (11). This case is not inconsistent with the proposition that the test whether a partnership has been formed is the intention of the parties, because, although they intended in a general sense to form a partnership, their agreement shows that they did not intend, so far as A was concerned, to enter at once into the relations of a partnership. It is an instance where a written instrument, apparently intended to

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(10) Beecher v. Bush, 45 Mich. 188, 193-4.

(11) Sailors v. Nixon Jones Co., 20 Ill. App. 509, 513.

create an immediate partnership, is inconsistent with itself (12).

§ 11. **Same: Changes of relationship.** When it is said that the question to be determined is the intention of the parties, on the date when the association is formed, it should be borne in mind that persons who have had business relations, otherwise than as partners, may become partners, expressly or by implication, through a change in their relations. An employer may take an employee into the firm. Creditors, who are carrying on a business temporarily to pay their debts out of the business of an insolvent firm, may conclude to form a partnership with the members of the firm. The man who has leased his hotel may afterwards take a share of the profits as rent, give the lessee a part interest in the hotel, and engage actively with him in its management. All of these things may be done, without drawing up any formal partnership articles, and even without any express oral agreement to form a partnership.

§ 12. **Other characteristics of a partnership.** It has been pointed out that a partnership is (1) an *association,* (2) of *two or more* persons, (3) for *the purpose of carrying on a business* together, and (4) *sharing profits.* Other features of a partnership may be noted: (a) It is unincorporated. If incorporated, it ceases to be a partnership. If the firm of Brown, Jones & Co. is incorporated as "The Brown-Jones Company" or, in the English fashion, "Brown, Jones & Company, Limited," the corporation is a new legal person, and the members of the

(12) See Mechem, Elements of Partnership, § 44.

firm become simply stockholders in the corporation. (b) A partnership ordinarily involves a contribution by the members of property and services to a common fund or capital. This is not essential, however. It is quite possible to conceive of a partnership in which one member of the firm is to do all the work, and to which the others are to contribute nothing, but all are to share profits and losses, and each is to have authority to act for the others. (c) A partnership requires the consent of all to the membership of each. Membership is not transferable by one partner without the consent of the others. An apparent exception to this rule of non-transferability exists in the case of a mining partnership, where the owners in common of a mine work it together and divide the profits. The share of a partner in such cases is usually transferable (13). (d) The partners are mutual agents, with authority to act for each other in the conduct of the partnership business. Except in cases of limited partnerships, this is almost invariably true; yet mutual agency is not the test of the existence of a partnership, as pointed out above in § 3.

§ 13. Is the firm an entity separate from its members? Analogy of common ownership. Suppose a man dies, leav-as his only heirs four nephews and nieces, John, Robert, William and Sarah, who become owners of his house and land. They employ a person as caretaker, but fail to pay him, and he has to sue them for his bill. Obviously, in such a case, the caretaker must bring suit against the four heirs as individuals. All four must be named as

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(13) See Shumaker, Partnership, 10, § 5.

defendants in his writ, and the writ must (except by statute in a few states) be served on each separately. They are simply owners in common of the property. There is no way in which he can sue them all as "the heirs of John Smith."

§ 14. **Same: Analogy of voluntary associations not for profit.** Suppose Brown, Smith, Jones, and Robinson form an amateur photographers' club. Brown, with the consent of the others, buys for the club some photographic materials, which he does not pay for. The dealer, to recover damages against the members of the club, must bring suit against all the members as separate individuals, and serve the writ on each separately. He cannot, at common law, sue "The Flashlight Camera Club" and serve the writ on one of the members in behalf of them all. By statute in several states, such a voluntary association may be sued by the name it has adopted, or in the name of its president, and may be sued by making service of the writ upon one of its officers (14).

Suppose five hundred men form a labor union, and organize a strike, in the course of which they use violence or unlawful intimidation against other employees who refuse to join them. The employer applies to the court for an injunction against further unlawful conduct. He must join as a defendant in his writ every member of the union against whom he wishes an injunction to issue. He can-

(14) So in New York, Michigan, Minnesota, and Connecticut. See note in 2 L. R. A. (N. S.) 789. Apart from statute this cannot be done: Bennett v. Lathrop, 71 Conn. 613; Karges Furniture Co. v. Amalg. Woodworkers' Union, 165 Ind. 421; St. Paul Typothetae v. St. Paul Bookbinders' Union, 94 Minn. 351, 357; Fredendall v. Taylor, 23 Wisc. 538.

not bring his suit against "Bricklayers' Union No. 3," and serve the writ on its president or treasurer, and have an injunction issue against the union and all its members (15). He may however, since the suit is in equity, allege that the members of the organization are numerous, and that he brings a suit against a number of them as representatives of them all. And by statute, in certain states, he may sue the association practically as if it were a corporation (16).

§ 15. **Same: Not an entity at common law.** Suppose Brown, Jones, Smith, and Robinson, instead of organizing a club of amateur photographers, had formed a partnership to carry on the business of manufacturing cameras. Could the firm be sued by its firm name, or must the members be sued separately, as if they were owners in common of real estate, or members of a "voluntary association" like a club or labor union? The firm cannot be sued as a whole. The suit must be brought against the members separately. It is usual to describe them in the writ as "John Brown of Chicago, Peter Jones of Hyde Park, Samuel Smith of Norwood, and Walter Robinson of Chicago, doing business under the firm name of Brown, Smith, Jones, and Robinson and having a usual place of business in Chicago"; but the statement of the firm name is not strictly necessary, under the law of most states. A suit by the firm should be brought by the indi-

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(15) Pickett v. Walsh, 192 Mass. 572, 589.

(16) U. S. Heater Co. v. Iron Moulders' Union, 129 Mich. 354. See note 14.

vidual members (17). Apart from statutes, the title of a suit brought by a firm will not be "Maynard, Potter & Co v. Roberts" but "Maynard and others v. Roberts." The reason why a firm cannot be sued as such at common law is that the common law courts have not been disposed to regard the firm as a separate body or entity, distinct from its members. They have regarded it as a collection of individuals, just as in law an unincorporated social organization, or a group of heirs or other joint owners, is a collection of individuals and nothing more.

§ 16. **Same: Mercantile theory.** To a merchant this conception—or lack of conception—of a partnership is ordinarily surprising. A business man regards the debts due the firm as debts due to something which is distinct from the individuals who compose it. As to a debt due from the firm, he considers that the firm owes the debt, rather than the partners. As to balances standing to the credit or debit of one partner or another on the books, the partners, like the bookkeepers, assume that such a sum is owed the partner by the firm, or due from the partner to the firm, rather than that there is a balance due from one partner to another. Yet the courts of law do not recognize the partnership as having an existence of its own. The firm of Brown, Jones & Robinson is not an individual of itself; it is simply three men. Courts of equity, on the other hand, when cases involving the affairs of a part-

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(17) Lee v. Orr, 70 Cal. 398. Many cases on this subject are collected in 30 Cyc. 560-2. In several states, by statute, a partnership may sue and be sued or be taxed by its firm name, just as in other states a voluntary association may, and as in some states taxes may be assessed against the "Heirs of John Smith" without naming them individually.

nership come before them, are said to recognize the individuality of a partnership, and to treat it as an entity distinct from its members (18). This really means that in certain classes of cases the judges have found it convenient to assume that the firm has a separate existence of its own. And of recent years there has been a tendency on the part of some writers to accept the mercantile idea of a partnership as the true legal theory, and to urge that, instead of saying that the partners are each the agent of the others, we should say that all are agents of a separate legal body, the firm (19).

§ **17. Same: Conclusion.** But it is believed that the view which regards the firm as simply a group of individuals, having no individuality of its own, is the sounder (20). "In Scotland, France, Italy, Germany, Belgium and Russia, the firm is a distinct *persona,* but with us [in England] I think the firm is merely recognized as a convenient symbol or shorthand form for collectively designating all the partners, regarded as joint creditors or debtors, just as we use "a" and "b" in algebraic computations to designate known quantities which it would be inconvenient to specify at length"(21). It makes little

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(18) See, for example, Chief Justice Cooley's remarks in Robertson v. Corsett, 39 Mich. 777, 784-5.

(19) Parsons on Partnership (4th ed.) §§ 3-5; Burdick on Partnership (2d ed.), Chapter III. This view has been due largely to certain expressions of Sir George Jessel in the English case of Pooley v. Driver, 5 Ch. D. 458, 476.

(20) Shumaker on Partnership (2d ed.), 97-101; Mechem's Elements of Partnership, §§ 4, 5.

(21) Underhill on Partnership, 63. The subject is very fully discussed, and the difficulties of the strictly legal view are pointed out, in Chapter III of Burdick on Partnership.

practical difference which theory is adopted. Most questions of partnership law, like certain problems in geometry, work the same way by either of the two methods.

§ 18. **What a partnership is not: Not a corporation.** It will aid in forming the conception of a partnership to point out certain distinctions. As previously stated, a partnership is widely different from a corporation. A corporation is a separate entity. It may sue or be sued in its own name. It has a legal existence apart from its stockholders. Its existence continues forever, unless the company was incorporated for a limited period. A partnership is terminated by the death or bankruptcy of any of the partners. In a corporation, the shares of stock are transferable, and the transferee becomes a new stockholder. In a partnership, if one partner transfers his interest without the other partners' consent, this ordinarily dissolves the partnership; the transferee cannot become a partner without consent of all the others. In a corporation, the liability of stockholders is limited. Usually the stockholder cannot be held personally liable for the corporation's debts, after he has paid for his stock in full. A member of a partnership, however, is liable for all the debts as absolutely as if he owned the whole business himself.

§ 19. **Same: Not a mere tenancy in common or joint ownership.** Persons who are tenants in common of real estate, such as heirs or joint purchasers, or who are joint owners of personal property, such as a ship, a horse, or a threshing machine, are not necessarily partners, although they own their property in the same way as they would

if they were partners. They may go further, and associate themselves for the purpose of carrying on a business and sharing the profits, in which case they would become a partnership. If they do not do this, their relation to each other differs in a number of respects from the relation of partners. For example, there is no mutual agency for each other. One of several heirs cannot bind the others without their consent. If one employs a man to mow the grass without express or implied authority from the others, the others will not be responsible for his pay, though it might be otherwise if this was absolutely necessary for the preservation of the property. Any of the co-owners may transfer his share of the property. If A, one of the heirs, sells his interest to X, X will be in the same position as A in his relations to the other heirs. Co-ownership does not necessarily imply a sharing of profits or losses, and indeed may not exist for the sake of gain at all.

§ 20. Same: Not a mere "voluntary association." It has been said in § 8, above, that an association not formed for carrying on a business and sharing the profits, such as an association of amateur photographers, is not a partnership. In a Pennsylvania case, after the presidential election of 1840, the Whigs of Pittsburg met at Irons's tavern and voted to hold a large dinner there to celebrate Harrison's election, appointing a committee of thirteen to make arrangements. The proprietor served a dinner, of which four thousand people of all political parties partook "with wonderful cordiality." The proprietor sued the committee for his bill. It was held that the committee were jointly liable, because they had concurred in giving

the order for the dinner; but the court said that their liability did not rest on the ground of partnership (22). If the officers of a Masonic lodge give notes in the name of the lodge, for money borrowed to erect a building, the other members are not liable on the notes except so far as it appears that they authorized their issue. They are not partners (23). Similarly, it is clear that a person who becomes a member of a Young Men's Christian Association would not be authorized to sign a note in the association's behalf. But the members of such an unincorporated organization or "voluntary association" may be liable, like any other group of joint principals, for the authorized acts of their agents. For example, if twenty men organize a co-operative association to run a meat market, and employ A and B as managers, with or without salary, and the association fails, all twenty are liable for the price of goods which A has bought (24).

§ 21. Other distinctions. If C and D buy goods jointly to divide among themselves, they are not partners, though if they buy with the intention of selling them again and sharing the profits, they may become partners in this transaction. Joint promoters who are trying to organize a company are not partners. Neither are persons partners who have in good faith attempted to organize a corporation, but fail to comply with the statutory requirements, although in the early American decisions there was a tendency to hold them liable to the same extent as

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(22) Eichbaum v. Irons, 6 W. & S. (Pa.) 67.
(23) Ash v. Guie, 97 Pa. St. 493, 499.
(24) Davison v. Holden, 55 Conn. 103.

partners. The subjects of limited partnership and the various organizations grouped under the name of joint stock companies will be considered below, Chapter VII.

CHAPTER II.

THE CREATION OF A PARTNERSHIP. FIRM NAME, CAPITAL, AND GOOD WILL.

§ 22. **Classes of partnerships.** Partnerships have been classified, with reference to the business they do, as trading and non-trading partnerships. A firm of merchant tailors is considered to be a trading partnership. Examples of non-trading partnerships are firms of attorneys, physicians, and publishers. These are sometimes called partnerships of occupation. A member of a non-trading firm has not implied authority to give a promissory note in the name of the firm.

Partnerships are also classified, with reference to the extent to which they include the activities of the members, into universal, general, and particular or special partnerships. If A, B, and C put into a common fund all their property, including real and personal estate, and all are to put in their entire time and share in all profits, however earned, this is a universal partnership. Such partnerships are rare, but instances exist (1). A general partnership is the usual kind, where the members contribute certain specific sums of money or property and their time, for the carrying on of one or more specific businesses. A special

(1) Goesele v. Bimeler, 14 How. 589, 607 (society of separatists at Zoar, Ohio) ; Gray v. Palmer, 9 Cal. 616, 638.

partnership is one formed for a single transaction or venture: if A and B, for instance, form a partnership to sell one issue of municipal bonds, or to send a particular cargo of goods to China for sale. A special or particular partnership is not the same as a limited partnership, although in a limited partnership the partner whose liability is limited is usually called a special partner.

§ 23. **Classes of partners.** Suppose that in the firm of Brown, Jones, Smith & Robinson, wholesale meat dealers, Brown and Robinson are the men who do the active work of the firm. They are at the office daily, and make the contracts and see the customers. They are properly called the active partners. Smith comes down to the office occasionally, but does not take any real part in the business. He is not an active partner, but, like Brown and Robinson, he is an ostensible partner—that is, he is known and held out to the public as a member of the firm. Jones has withdrawn from active business, but leaves his capital in the firm and gets his share of the profits monthly. He is a silent partner. A fifth man named Peters is in a somewhat similar position; he has money invested in the firm, but takes no part in its business, though he receives his share of the profits. His name does not appear on the firm stationery, and he is not known to the customers to be connected with the firm. He is a secret partner. He may also be called a dormant partner. This term "dormant partner" would not be properly applicable to him, if he were a secret partner taking an active though concealed part in the management of the firm (2). If Brown should later

(2) Burdick on Partnership (2d ed.) 79-82.

retire from the firm and cease to own a share in the capital, or be entitled to a share in the profits, but the other members should continue to carry on the business, using Brown's name, Brown would be a nominal, as distinguished from a real, partner in the new firm. Special partners will be discussed under the subject of limited partnerships in Chapter VII, below.

§ 24. **Who may be partners? In general.** Partnership is a contractual relation, or, as some say, a status growing out of contract. It is based on an express or implied contract to enter into the relation which constitutes a partnership. Hence, in general, any person capable of making a valid contract may become a partner.

§ 25. **Same: Infants.** An infant (that is, a person under age) may be a partner, but there are certain disadvantages in having a minor as a member of a firm. It is familiar law that an infant is not liable on his business contracts. Consequently, if A and B form a partnership with C, a minor, and C violates the provisions in the articles of partnership, C is not liable to A and B for the breach. If the firm gives a note and A and B pay it, they cannot collect a third of the amount from C (3). Furthermore, he is not liable for any goods bought, or any notes given, by the firm, or upon any other contract made by it (4). An infant partner in a firm of teamsters is not liable for grain furnished the firm for its horses, and, if the firm is sued, judgment will be entered against his

(3) Neal v. Berry, 86 Me. 193.

(4) Mehlhop v. Rae, 90 Iowa 30; Mason v. Wright, 13 Met. (Mass.) 306.

partner alone for the full amount. Articles bought to trade with, or to use in business, are not necessaries for a minor. So, if he buys a barber's chair and furniture for a shop, he may return the articles and recover back his money from the seller, although the trade of a barber is his only means of support. These articles are not like journeymen's tools, which may be necessaries (5). But if he continues in the business after he becomes of age he will usually be held to have ratified the partnership transactions. To repudiate them he must give notice of his intention to do so while a minor, or promptly on coming of age. If a minor gets a person to take him into partnership by falsely stating that he is of full age, a court of equity will order the partnership dissolved. (6). And, while the minor may repudiate the partnership agreement, until he does so he has all the rights and powers of an adult partner. He is entitled to equal possession with his adult partners of the firm property. He may incur and collect firm debts, may buy and sell firm property, and may, like his partners, subject the partnership to liability in contract or in tort, in matters within the scope of the partnership business (7). If he repudiates the partnership agreement, he cannot, upon so doing, withdraw the money or property he has put in, so as to deprive the creditors of the partnership of these assets to pay their claims (8).

§ 26. **Same: Married women.** Under modern stat-

(5) Ryan v. Smith, 165 Mass. 303.

(6) Bush v. Linthicum, 59 Md. 344, 349.

(7) Parker v. Oakley (Tenn. Ch. App.) 57 S. W. 426.

(8) Lovell v. Beauchamp [1894] A. C. 607; Yates v. Lyon, 61 N. Y. 344; Page v. Morse, 128 Mass. 99.

utes, a married woman may become a partner in a firm. In some states she cannot make a valid contract with her husband, and hence cannot be a partner with him, or in a firm of which he is a member. In other states, however, she may be a partner with her husband (9).

§ 27. **Same: Lunatics and aliens.** If a member of a firm is or becomes insane, the partnership does not necessarily terminate, for an insane person may be a partner. His contracts, like a minor's, are not absolutely void, but voidable if he or his guardian chooses. The insanity of a partner, however, may be a ground on which a court of equity will decree a dissolution of the firm. A foreigner may be a partner, as is often the case with international banking firms; but, if war is declared between the countries, the effect is to suspend or dissolve the partnership.

§ 28. **Same: Other firms and corporations. Sub-partnerships.** Two firms, or an individual and a firm, may form a partnership. In this case there is really a merger of the two firms, and all the members of each become members of the joint firm. Such a partnership of firms may be formed for a single transaction, in which case the members are viewed as constituting one large firm as to that transaction, and separate firms in their own business. A corporation has no power to become a member of a partnership, unless this power is expressly given by statute, or in its articles of incorporation (10). This power is frequently given. Corporations having the power may become partners with each other, or with individuals.

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(9) Plumer v. Lord, 5 Allen 460; Hoaghlin v. Henderson & Co., 119 Iowa 720.

(10) Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 595.

If a member of a firm agrees to share his interest with an outsider, this creates what is called a sub-partnership. The effect is not necessarily to make the latter liable for the debts of the firm as one of its partners, though, if he becomes the real owner of the partner's share in the profits and assets of the firm, he will be liable as a partner, since he stands in the ostensible partner's place (11).

§ 29. **Partnership articles.** No particular form of words is required for a partnership agreement. The instrument usually begins by naming the signers and their residences, and stating that they "agree together as follows," after which there comes a series of numbered paragraphs or "articles," stating what shall be the firm name, business or businesses, the place of business, the date of beginning and duration or term of the partnership, the capital to be contributed, the share of each in profits, losses, and assets, the amount of time to be given by each partner to the business, the amount each may draw and at what intervals, and, frequently, provisions for retirement of a partner or dissolution of the firm, and the distribution of assets upon the dissolution (12). Provisions are sometimes inserted for the admission of relatives or other persons in future as new partners. A common provision is to restrict the power of a single partner to sign notes for the firm, or to provide that no person shall sign or indorse a note or become surety on a bond for any person outside the firm. Such provisions are not valid against a person

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(11) Burnett v. Snyder, 81 N. Y. 550, 553; Webb v. Johnson, 95 Mich. 325, 331.

(12) Many precedents for partnership articles will be found in Jones's Forms in Conveyancing.

who becomes the holder of an instrument signed by a person contrary to the partnership articles, without notice of the restriction; but the partner who has violated the restriction may be liable to the others for so doing. Besides, such a restriction often proves a convenient excuse to give to unfortunate friends.

If the contract provides that the partnership is to begin at a future time, there is of course no partnership till that time comes, and the rule is the same where the partnership is formed without a written contract.

§ 30. **Written agreement not necessary.** A partnership, as just intimated, does not require a contract in writing. This in most states is true even if it was organized to deal in real estate (13). The reason is that such an agreement of partnership is not a sale or transfer of an interest in land, which would have to be in writing under the statute of frauds. It is simply an agreement to engage in the business of dealing in land. There are some cases to the contrary, however, requiring a partnership agreement to be in writing if the firm is formed to deal in real estate (14). It may be made by oral agreement, or it may arise from the acts or words of the parties, showing that they have formed the intention to enter into the relation of partners, even if they have never used the word "partnership," and even if they never realized that the relation they were forming was that of partners.

§ 31. **What acts create a partnership: In general. Mutual agency.** What acts of the parties, other than an

(13) Flower v. Barnekoff, 20 Oreg. 132, 138.

(14) Goldstein v. Nathan, 158 Ill. 641; McCormick's Appeal, 57 Pa. St. 54.

express oral or written agreement to enter into partnership with each other, will create the partnership relation? This question has been answered in a general way by §§ 9-11, above. As stated there, any acts or words which indicate an intent to enter into the partnership relation are evidence tending to prove that that intention existed, and therefore to show that a partership was formed. But what specific acts have been held to be, or not to be, evidence from which it could properly be inferred that such an intention existed?

The fact that two persons agreed that each should have authority to act as agent for the other in a joint transaction for the profit of both, would be strong evidence of partnership in that transaction; but it is rare that persons make an express agreement for mutual agency, except where they explicitly declare themselves partners.

§ 32. **Same: Sharing profits or gross returns.** The fact of sharing profits is strong evidence that the sharer is a partner. But it is not conclusive, for he may be an employee who is paid by a commission on profits (15), or a creditor, who is to have a share of the profits till his debt is paid (16). In instances where a person is entitled to a share in the gross returns of a common enterprise, but is expected to pay his own expenses, the situation is usually one of ownership in common rather than of partnership. The receipt of a percentage of the gross receipts, without regard to the expenses, usually indicates that a person is not a partner (17).

(15) Sodiker v. Applegate, 24 W. Va. 411, 415.

(16) Cox v. Hickman, 8 H. L. 268.

(17) See Mechem's Elements of Partnership, § 53.

§ 33. **Same: Sharing profits but not losses.** While a partnership normally implies that the partners shall share both profits and losses, an agreement that one party shall share profits only, even with an express stipulation that he shall not be liable for losses, may create a partnership. A well-known Illinois case furnishes an instance of this (18). In that case the parties had signed an agreement by which Robbins advanced $254 to buy cattle to fatten and sell. Laswell was to find the cattle and pay the expenses of keeping and selling them. The title was to remain in Robbins till sold, and the profits were to be equally divided. Laswell guaranteed Robbins 20% profit. This was held to create a partnership. If Laswell had left a feed bill unpaid, Robbins would have been liable to the creditor as well as Laswell, in spite of Laswell's agreement to pay all the expenses. If there is a partnership, all the partners are jointly liable to pay bills contracted for the firm, and the stipulation that one shall not share in losses or expenses merely gives him a right to get back from his partners what he had to pay the creditors.

§ 34. **Same: Sharing losses only.** An agreement to share losses does not usually constitute a partnership. Such agreements are not common in commercial transactions, as when persons embark upon a joint undertaking they ordinarily have profits rather than losses in view; but there are instances where agreements have been made by connecting railroads to divide up the losses sustained

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(18) Robbins v. Laswell, 27 Ill. 365, 368.

by the unlocated loss of through freight (19). An agreement to share the costs of a law suit does not constitute the parties partners (20).

§ 35. **Liability to third persons as partners by holding out.** Suppose Brown and Jones, men of moderate means, engage in a clothing business with a small amount of capital. After some years of fairly successful business, they happen to employ Robinson, a young man of a rich family, who has large means of his own. Robinson, in going about as confidential clerk of the firm, contrives to give many people the impression, either by direct statements or by veiled hints, that he is a partner in the business. Walker, a clothing manufacturer, believing that Robinson is a partner, on the strength of his credit sells the firm a large bill of goods. Before this bill is paid the firm makes an assignment. Robinson is liable, jointly with Brown and Jones, for the whole debt, just as though he were a partner. Robinson is estopped as against Walker to deny that he is a partner in the firm, because he has held himself out to Walker as a partner (21). A more frequent case is where a partner, whose name does not appear in the firm name, retires without giving notice of his withdrawal; persons selling goods to the firm think he is still a member, and, subsequently, when the firm fails, he finds to his cost that he is liable to these persons as if he had remained a partner (22). So a person becomes li-

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(19) Irvin v. Nashville, etc. Ry. Co., 79, 92 Ill. 103, 108.

(20) Carter v. Carter, 28 Ill. App. 340, 343.

(21) Wallerich v. Smith, 97 Iowa 308. See Waugh v. Carver, 2 H. Bl. 235, 246.

(22) Carmichael v. Greer, 55 Ga. 116.

able by allowing his name to be used in the firm name, although really he is not interested in the business, but is simply a clerk (23). Moreover, if Robinson does not himself represent that he is a partner, but allows Jones to introduce him to a customer as "Mr. Robinson of our firm" or "my partner, Mr. Robinson" he will make himself responsible to the customer as a partner. If Robinson has stood by and allowed himself to be represented as a partner without protest, the effect is the same as if he had made the representation himself (24).

§ 36. **Same: "Partnership by estoppel."** These are obvious instances of a person's becoming liable as a partner by holding himself out, or permitting himself to be held out, as such. Clearly it is fair that a man who allows others to think that he is a member of a firm, and to do business with the firm in reliance upon his credit, should be held responsible to persons giving the firm credit on the faith of this supposition, and that he should be liable to the same extent as if he were actually a partner. This is sometimes called "partnership by estoppel." The subject is treated more in detail below (§§ 57, 60, 70, 73). It is mentioned at this point because many writers state the rule by saying that persons may be partners as to third persons when they are not partners among themselves—as if there were two kinds of partnership—partnership as between the individuals intending to be partners, and partnership as to third persons. It is better to avoid the term "partnership as to third persons," and to say that a per-

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(23) Bartlett v. Raymond, 139 Mass. 275.

(24) Slade v. Paschal, 67 Ga. 541.

son not a partner may be held liable to third persons, to the same extent as if he were a partner, on grounds of estoppel, because he has expressly or impliedly represented himself as such, or has permitted others to do so. The principle is the same as that doctrine of agency by which a person, who holds out another as his agent, is liable for the latter's acts, as if he were really the authorized agent of the former. The latter is not really the former's agent, but the former is held responsible because he has so conducted himself as to lead others to think so. It is just that he should now be estopped to deny that the other was his agent.

§ 37. **Firm name.** A firm name is not a necessary feature of a partnership. Persons have often been held to have become partners, as the result of their business relations, where they have never entered into any formal association as a firm, or supposed that they were creating a partnership at all, if their dealings with each other have been such as to show that they intended to enter into the relation of partners. Two persons may be partners in a single transaction or venture, and not in their general business affairs. Signing the firm name has the same effect in law as if the partnership had no firm name and all had signed their names as individuals (25). Doing business under the name of "W. E. Patrick & Co., brokers" does not necessarily imply that there is a partnership (26). In an Illinois case (27) it was held that there was no pre-

(25) Haskins v. D'Este, 133 Mass. 356.
(26) Jordan v. Patrick, 207 Pa. St. 245.
(27) Robinson v. Magarity, 28 Ill. 423, 426.

sumption that the name "Robinson, Dunham & Co." included more than one person. In most states the law is otherwise; such is the presumption, although it may be shown that the name represented only one man. Where a partnership has a firm name, it is not bound to use it—the result will be the same, if all the partners sign in their individual names—and this they should do in giving a deed of real estate or bringing a suit. A deed to the firm should be made to the partners as individuals; it has been held that a deed to "D. B. Dorman & Co." did not convey to Binney, who was Dorman's partner (28).

Apart from statutory restrictions a partnership may adopt any name the members choose. Smith and Jones may do business as "Smith, Jones, & Brown," "Smith & Co.," "Smith Bros.," "Robinson & Co.," or even "Vanderbilt & Astor." To prevent fraud, some states require that firms using a fictitious name, or a name that does not show the names of all the partners, must register the names of all members with the secretary of state or with the town or county clerk. Others forbid the use of a former partner's name without his consent or that of his executor. Others forbid the use of a name likely to be taken for the name of a corporation. The use of the firm name in a contract prima facie implies that the matter is a partnership transaction.

§ 38. **Capital.** A partnership may be formed without capital, particularly if it is a partnership for professional services, such as a partnership of attorneys or dentists. In some instances a member of a firm, instead of putting

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(28) Gille v. Hunt, 35 Minn. 357, 360.

in money or property, allows the firm to use certain property of his, such as a mill, of which he keeps the title himself (29). In such a case what he contributes is not property, but the use of property. Where the partners, either at the organization of the firm or later, put in a certain sum in money or property, as a fund for starting or carrying on the business, it is obvious that the amount contributed by them need not be equal, and the share of the profits and interest in the property of the firm need not be proportionate to the amount of capital that each contributes. The parties may make any agreement they please as to these matters. When the partnership is dissolved, if there are sufficient assets, each member who has contributed to the capital gets back the amount contributed—with interest, if the partnership articles so stipulate—and the surplus is divided, either in proportion to the amount of capital put in by each, or in such other manner as the partnership agreement provides. If there are not enough assets to pay back the capital, the deficiency is treated as a firm debt, which each partner must contribute to pay, in the same proportion in which he would have to contribute to pay any other debt of the partnership. This is prima facie in the same proportion in which he would have been entitled to share in profits (30). The subject of capital is of much less importance in a partnership than in a corporation, because the partner's liability for debts is not limited to the amount of capital he has invested.

(29) Citizens' Fire Ins. Co. v. Doll, 35 Md. 89, 105-6.

(30) Whitcomb v. Converse, 119 Mass. 38. In this case it was held that two partners who were to put in only their time must contribute to make up a deficiency in the capital put in by the others.

§ 39. **Good will.** The good will of a partnership means simply the probability that persons doing business with the firm will continue to deal with it on equally favorable terms. Lord Eldon in a famous case said that the good will "is nothing more than the probability that the old customers will resort to the old place" (31). This is not quite accurate, because the firm's friendly relations with the persons from whom it buys, and even with its competitors, may be an asset of much value. English courts have recognized that there may be a good will of a lease; the probability of a tenant's getting a renewal on the same favorable terms may be of value. Good will is not peculiar to partnerships; obviously there may be a good will of an individual's business, or of a corporation's, as well as of a firm's. The good will of a business, like a man's reputation, is often of great value. Like reputation, also, good will is an asset somewhat intangible and of unstable value. The good will of a business may be sold, although it is likely to shrink materially in worth. Its selling value is much greater in case of a trade partnership than of a professional one, for, in the latter case, the value rests chiefly on the customer's or client's confidence in the personal skill and integrity of the owners of the business (32). On the death of a partner, the good will of a business does not belong to the survivor, but is to be appraised or sold and divided between the estate of the deceased partner and the survivor, like the rest of the partnership property (33).

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(31) Cruttwell v. Lye, 17 Ves. 335, 346.
(32) See Burdick on Partnership (2d ed.) 374-6.
(33) Rammelsberg v. Mitchell, 29 Ohio St. 22, 54.

CHAPTER III.

RIGHTS AND LIABILITIES OF PARTNERS AMONG THEMSELVES. PARTNERSHIP PROPERTY.

§ 40. **Duty of good faith.** It is essential to the successful maintenance of the partnership relation that each partner should be able to rely upon the others' good faith. Each stands towards the others in a position of trust and confidence—a fiduciary relation—and this relationship imposes upon him the duty of exercising the same good faith that must be exercised by a trustee. If a large part of the business of a firm of attorneys is in the collection of certain claims of inspectors of customs, which are particularly in charge of one member, and this partner, by concealing the amount due the firm for fees in these cases, gets the other partner to sell out to him his interest in the firm at a low figure, this is a violation of his duty of good faith which will require the setting aside of the sale (1). If Smith & Brown, sewer contractors, are promised a city contract for building a sewerage system, and Brown, who has charge of the negotiations, finding a hitch in getting the contract awarded, takes the contract in his own name without informing Smith, he will be declared to hold the proceeds of the contract as trustee for the joint

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(1) Baker v. Cummings, 4 App. Cas. (D. C.) 230, 261.

benefit of Smith and himself (2). If Brown buys property for the partnership, he cannot take a secret commission from the seller (3). If he sells his own property to the firm, the sale will be fraudulent if he makes a profit without disclosing the facts (4), and if he buys goods from the firm himself, without the consent of the others, the purchase may be set aside (5). If the firm's lease is about to run out, and Smith goes to the landlord and renews it in his own name, this is a fraud upon his partner, and Smith will be declared to hold the lease as a constructive trustee for the benefit of the firm. He cannot demand an increased rent from his partners (6).

§ 41. **Devoting time to the business.** Partnership articles should state whether each partner is to devote his whole time to the business of the firm. He may be a dormant partner, who puts in money but does not work. In the absence of agreement, he is not bound to engage in no other business, so long as he does not neglect the business of the firm (7). But he cannot engage in a competing business; and if he does so he will be enjoined from continuing it, and made to account for the profits (8).

§ 42. **Other duties.** Among the other duties of a partner are to comply with the partnership articles and to

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(2) Miller v. O'Boyle, 89 Fed. 140.

(3) Emery v. Parrott, 107 Mass. 95, 100.

(4) Bentley v. Craven, 18 Beav. 75, 77.

(5) Nelson v. Hayner, 66 Ill. 487. See Latta v. Kilbourn, 150 U. S. 524, 541.

(6) Featherstonhaugh v. Fenwick, 17 Ves. 298, 311.

(7) Parsons on Partnership (4th ed.) 197-8, § 53. Compare Burdick on Partnership (2d ed.) 327; Mechem's Elements of Partnership, § 113.

(8) Marshall & Co. v. Johnson, 33 Ga. 500, 506-8; and see Lockwood v. Beckwith, 6 Mich. 168. 178.

see that proper accounts are kept. While he is not liable for an honest error of judgment (9), he may be liable to his partners for carelessness amounting to gross neglect; and, if he omits to consult his partner on a matter peculiarly within the latter's knowledge, this may be evidence of negligence (10). The cases are rare, however, in which a partner has been held liable to his associates for the consequences of a merely negligent act done in good faith.

§ 43. **Right to participate in management.** Unless otherwise provided in the partnership articles or by subsequent agreement, all partners have an equal right to participate in the management of the business, without regard to their interest in the capital or profits (11). This is one of the differences between the rights of a partner and those of a stockholder in a corporation (12).

§ 44. **Powers of the majority.** In the absence of agreement to the contrary, a majority of the partners have controlling power so long as they act in good faith. They cannot however admit new partners (13), or expel a partner without cause (14), or engage in a wholly different business, or a transaction radically outside the scope of the regular business of the firm (15), without the consent of all.

(9) Charlton v. Sloan, 76 Iowa, 288, 290, point III.

(10) Yorks v. Tozer, 59 Minn. 78, 81.

(11) Katz v. Brewington, 71 Md. 79, 82.

(12) Otherwise with "real estate trusts," and similar partnerships with transferable shares, sometimes called "joint stock companies." See Phillips v. Blatchford, 137 Mass. 510, 512; Howe v. Morse, 174 Mass. 491, 496, 503. See §§ 91-92, below.

(13) Meaher v. Cox, 37 Ala. 201, 215.

(14) Wood v. Woad, L. R. 9 Ex. 190.

(15) Abbot v. Johnson, 32 N. H. 9, 19-20 (change to liquor business); Zabriskie v. Hackensack, etc. R. Co., 18 N. J. Eq. 178, 183 (dictum).

§ 45. **Right to extra compensation.** A partner is ordinarily expected to give his time to the business, and look for compensation to his share of the profits. Hence he cannot claim special compensation for extra services caused by another partner's illness (16), or for winding up the business after a partner dies (17). But, if there is a provision in the partnership articles, or a special agreement, that he shall receive extra compensation, he may do so (18). And if one partner refuses to take part in the business, his associates may sometimes claim an allowance for this in a suit for an accounting (19). It depends upon the circumstances (20). An agreement for special compensation may be inferred from evidence of facts showing such an intention; as, for example, by the fact that one partner has been paid a salary when there were no profits (21).

§ 46. **Right to have firm property applied to pay firm debts.** Obviously, no partner has the right to take any of the partnership property for his private use, or to pay his own bills with the funds of the firm (22). Upon this rule depends the doctrine that, in case of insolvency, the partnership creditors have the right to have the partnership assets applied first in payment of the firm's debts,

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(16) Heath v. Waters, 40 Mich. 457, 465.

(17) Berry v. Jones, 11 Heisk. (Tenn.) 206, 210.

(18) Kinney v. Maher, 156 Mass. 252, 254.

(19) Mattingly v. Stone's Admr., 18 Ky. Law Repr. 187, 35 S. W. 921.

(20) Thayer v. Badger, 171 Mass. 279.

(21) Winchester v. Glazier, 152 Mass. 316, 323.

(22) Rogers v. Batchelor, 12 Peters 221, 229; Janney v. Springer, 78 Iowa 617; Brickett v. Downs, 163 Mass. 70, 72; Rogers v. Betterton, 93 Tenn. 630, 635-7. The right of the other partners to prevent this has been somewhaht loosely called the "partner's lien."

and that the individual creditors must look first to the individual assets of the members (23).

§ 47. **Right to contribution or indemnity.** If the firm of Peters & Robinson incurs a bill for merchandise ordered by Peters, and Peters pays the bill out of his own money, he may compel Robinson to repay him half, although the payment exceeds the capital of the firm, provided it was within the scope of the regular business of the firm to incur this bill (24). A suit for contribution ordinarily is brought in equity in connection with an application to have the partnership wound up and its accounts settled (25). This right to contribution as between the partners may be limited by express agreement (26), although such an agreement of course will not affect a creditor's right to sue them both.

§ 48. **Right to an accounting and division of profits.** Each partner has the right to full information about the partnership business. If this is refused, he may bring a suit in equity to have the partnership dissolved, and an account taken (27). In some instances, an accounting may be granted without a dissolution (28), but such instances are rare (29). In the absence of a provision in the articles of partnership, or an agreement, express or

(23) Fisher v. Syfers, 109 Ind. 514, 516; Mechem's Elements of Partnership, § 124.

(24) Ex parte Chippendale, 410 G. M. & G. 19, 42.

(25) See Burdick on Partnership (2d ed.) 330-1; Mechem's Elements of Partnership § 127.

(26) McFadden v. Lecka, 48 Ohio St. 513, 529-30.

(27) McCabe v. Sinclair, 66 N. J. Eq. 24.

(28) See 2 Lindley on Partnership (2d Am. ed.) 495.

(29) Lord v. Hull, 178 N. Y. 9, 19.

implied, on the subject, a majority of the partners may determine how the profits are to be ascertained, and how and when divided (30).

§ 49. **Powers of partners as between themselves.** So far as their mutual rights and obligations are concerned, the powers of each partner to bind the firm may be regulated by mutual agreement. The members of the firm of Brown, Jones & Robinson may agree that Brown shall be the only member of the firm with power to sign checks or issue notes, Jones the only one authorized to buy goods, and Robinson the only one empowered to engage employees, or to take out fire insurance. Then if Jones signs the firm name to a check, or Robinson orders a bill of goods, Jones or Robinson will be liable to the other partners for any damage caused by violating their agreement (31). But it does not follow that third persons without notice of these limitations will be bound by them. The acts described are all by general usage within the powers of all members of a mercantile partnership; and, as to third persons, the test is whether the act was within the scope of the partnership business—which obviously depends somewhat upon the nature of the business (32). The powers of partners to bind the firm as to third persons will be discussed in the next chapter. Neither as between themselves nor as to third persons would one partner have power to execute an assignment for the benefit of creditors; nor would he have authority to exe-

(30) 2 Lindley on Partnership (2d Am. ed.) 393-4.*

(31) Stone v. Wendover, 2 Mo. App. 247 (agreement not to sign accommodation notes).

(32) Parsons on Partnership (4th ed.) § 115.

cute a deed or any other instrument under seal, except a release. In many states, however, the difference between sealed and unsealed instruments has been abolished; and in most states a sealed instrument which did not legally require a seal would be binding upon the firm, if the partner would have power to issue it unsealed. So a note with a seal attached may be valid (33); or a power of attorney may be given effect as a letter of authorization.

§ 50. **Actions at law between partners.** So long as the partnership continues, a suit at law as to partnership matters cannot be maintained between one partner and another, or between a partner and the firm itself or its individual members. The reason for the rule is that it is impossible to find whether one partner owes another without taking a general accounting between them, and such an account can best be taken in a suit in equity (34). After the partnership has been terminated, an action may be brought at law to recover a final balance due from one partner to another, definitely ascertained by agreement between them or otherwise (35). An action may be brought at law where only a single item of account is in dispute (36). Some courts have gone farther, and declared that an action at law may be brought, although the partnership has not been wound up, if it was formed for a certain single transaction, which has been completed

(33) Purviance v. Sutherland, 2 Ohio St. 478, 482.

(34) Haskell v. Adams, 7 Pick. 59; Duff v. Maguire, 99 Mass. 300, 304. In many jurisdictions the distinction between suits at law and in equity has been abolished or changed by statute.

(35) Sikes v. Work, 6 Gray, 433.

(36) Arnold v. Arnold, 90 N. Y. 580, 582.

(37), while others say in substance that the rule that a suit cannot be maintained at law between partners does not apply where the matters in dispute are simple, and the case can be tried without taking a complicated account (38). But in general no rule of partnership law is more clearly settled. Of course it does not follow that because Jones cannot sue his partner and neighbor Brown in an action at law for breach of his duties as partner, he cannot sue him at law for trespassing on Jones' garden.

§ 51. **Suits in equity between partners.** Suits in equity are frequently brought to have a partnership dissolved and an accounting taken. In such a suit, if there is proper occasion for it, a receiver will be appointed to take charge of the partnership property, collect its accounts, pay its debts, and close its affairs. Since one partner cannot sue another at law, and neither is criminally liable for withholding possession of the firm property—for each has an equal right to possession—it is a too frequent practice among small firms, with little capital and a slender stock in trade, when a dispute arises as to a division of profits, for one partner to carry off the partnership property over night and refuse to give it up till his demands are complied with. In such a case a court of equity will usually be prompt to grant an injunction restraining him from disposing of the assets, appointing a receiver, and referring the case to a master to take an account (39). An

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(37) Kutz v. Dreibelbis, 126 Pa. St. 335, 339; Fry v. Potter, 12 R. I. 542.

(38) Wheeler v. Arnold, 30 Mich. 304, 306; Clarke v. Mills, 36 Kans. 393, 397.

(39) Fletcher v. Vandusen, 52 Iowa 448.

injunction will also be granted where a partner is committing a breach of the partnership articles, or violating his duties as a member of the partnership, either before or after the dissolution of the firm (40). But specific performance of an agreement to form a partnership will not ordinarily be granted, because impracticable (41).

§ 52. **Suits between firms having a common member.** Under the strict rules of the common law, a person cannot under any circumstances sue himself. That is one of the reasons why an action between husband and wife is not maintainable at common law. For the same reason, A, B, and C cannot at common law sue A, D, and E. The same person cannot be both plaintiff and defendant. This rule applies to suits between firms having a common member. No action can be maintained between them at common law (42). But a suit in equity between them may be maintained, at least for an accounting (43). Under codes providing for a fusion of law and equity procedure, the decisions are in conflict, some intimating that such actions may be maintained (44), and others holding that they cannot (45).

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(40) Marble Co. v. Ripley, 10 Wall, 339, 351; Roberts v. McKee, 29 Ga. 161.

(41) Morris v. Peckham, 51 Conn. 128, 133.

(42) Bosanquet v. Wray, 6 Taunt. 597, 605; Haven v. Wakefield, 39 Ill. 509, 518; Taylor v. Thompson, 176 N. Y. 168, 176-7.

(43) Crosby v. Timolat, 50 Minn. 171; Rogers v. Rogers, 5 Ired. Eq. (N. C.) 31.

(44) Page v. Thompson, 33 Ind. 137.

(45) Beacannon v. Liebe, 11 Oreg. 443; and see Allen v. Erie Bank, 57 Pa. St. 129, 140. See § 16, above, for cases supporting the theory that a partnership is a separate entity, distinct from its members.

§ 53. **Partnership property in general.** The property of a partnership obviously comprises, beside its stock in trade, all other personal or real estate acquired by it; and includes furniture, books of account, promissory notes, and corporation stocks acquired with partnership funds. Each partner's interest is in the whole of the firm property; but it has been said that, unlike most instances of joint ownership, his right is simply to a share of the surplus after paying debts. Part of this surplus may represent capital repaid to him; the rest is profits. His interest, being simply an undivided share, does not give him title to any particular part of the property. Hence he cannot say: "I will take this horse and wagon, or these notes, as my share, and sell them to pay my own bills." He may make an assignment of his interest in the firm property (although this will dissolve the firm), and his interest, under various state statutes, may be attached or sold on execution to satisfy a claim of one of his personal creditors (46).

§ 54. **Personal property.** It is obvious that if Smith and Brown go into the express business, and Smith lends the firm the use of a horse and wagon, the horse and wagon remain Smith's property; while if Brown buys office furniture for the firm with partnership funds, this is to be regarded as firm property, though Brown improperly takes the bill of sale in his own name. If Brown disputes the

(46) Mechem's Elements of Partnership, §§ 93-100. The theory that a partner's interest is different from a joint owner's rests on the proposition that his right is, not to a division of property, but to a sale of it and an accounting of profits. See § 16, above.

claim of his partner to an interest in the furniture, he will be declared to hold it as constructive trustee for both.

§ 55. **Partnership real estate.** As stated in § 37, above, a deed to a firm should name the individual partners as grantees, and not the firm. If the deed is taken in the name of one partner only, he will hold the title as a constructive trustee for all the members of the firm. This will be true if it appears from other evidence that such was the intention of the partners: for example, from the fact that the land was entered as a purchase on the partnership books, or that the firm proceeded to occupy the land for its business (47). When this partner dies, the land in most states will descend to his heirs as constructive trustees for all the members of the firm, including the estate of the deceased partner. If the title stands in the name of all the partners, the heirs of the one who dies take his fractional share as similar constructive trustees. In determining the interest of the firm, the land in general is to be treated as if it were personal estate (48). A partner, like any other owner in common of real estate, cannot give title to any specific part of the land, and a deed from him conveys only his undivided share. Like other owners in common, he cannot even convey his fractional share absolutely; his conveyance passes only the interest in the land which he would be entitled to receive if the firm were

(47) Robinson Bank v. Miller, 153 Ill. 244, 253; Parsons on Partnership (4th ed.) 349-53, § 265.

(48) Du Bree v. Albert, 100 Pa. St. 483, 487.

wound up and the property divided (49). For the same reason, the deceased partner's widow cannot claim dower in lands which the partnership has owned and sold, although she did not join in the deed to release dower (50).

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(49) Kruschke v. Stefan, 83 Wisc. 373, 385; Henry v. Anderson, 77 Ind. 361, 363.

(50) Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 240; Huston v. Neil, 41 Ind. 504, 507-10.

CHAPTER IV.

RIGHTS AND LIABILITIES OF PARTNERS AS TO THIRD PERSONS.

§ 56. **Power to bind firm. Scope of business.** The power of a partner to bind the firm extends only to matters within the scope of its business. The liability of one partner for the contracts made or acts done by another in behalf of the firm exists because the other is his agent. An agent has power to bind his principal only by acts within the scope of his authority; and the scope of a partner's authority is determined by the nature of the partnership business. Obviously, if Brown and Jones are partners, this does not make Jones responsible for a new hat bought by Brown on credit, or for injuries inflicted by Brown in a quarrel with his next door neighbor. But not all questions of the liability of a partner for the acts of his associates are so easy of solution. What is within the scope of a partnership business depends upon the business. A partner in general has power to bind the firm by "any act necessary for carrying on the firm business in the ordinary way" (1). What is such an act is to be determined by the usual practice of people engaged in that business (2). "A power to do what is usual does not include a power to

(1) Shumaker on Partnership (2d ed.) 182.

(2) Irwin v. Williar, 110 U. S. 499, 505-6.

do what is unusual, however urgent'' (3). The emergency alone cannot create the authority, although authority may exist to do a thing in an emergency which is not authorized under ordinary circumstances. There is a marked difference between the scope of a partner's authority in a trading business and in a non-trading business. As to trade partnerships, especially, there are some fairly well settled general rules (4); but even those are not of universal application; it is always a question whether the act was within the scope of the partnership in the particular case (5).

§ 57. **Holding out. Actual and apparent authority.** The subject of liability as a partner by the principle of estoppel has been referred to above (6), and it has been said that a person who is not a partner may incur the same liability as if he were one, if he holds himself out, or permits himself to be held out, as a member of the firm. A similar rule applies as to a partner's authority. One partner may be liable for the act of another partner, outside the scope of his authority, if he has held out the other as having authority to do that act (7). The partners may, by a provision in the articles of partnership or by subsequent agreement, limit the authority of any member of the firm. Such an agreement will be binding among themselves, and

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(3) In re Cunningham & Co., 36 Ch. D. 532, 539; Hawtayne v. Bourne, 7 M. & W. 595, 600.

(4) See §§ 59-63, below.

(5) Mechem's Elements of Partnership, §§ 161-2, 166; Burdick on Partnership (2d ed.) 183.

(6) §§ 35-36, above.

(7) Winship v. U. S. Bank, 5 Pet. 529, 561; Irwin v. Williar, 110 U. S. 499, 505-6; McPherson v. Bristol, 122 Mich. 354, 358, point 2.

the member will be liable for any violation of it. But as to third persons, who have no knowledge of the agreement, it is not actual but apparent authority that controls (8). This is true in all cases in which the question arises whether a principal is liable for the act of his agent. If Brown and Jones are engaged in business as horse-breeders they may agree that Brown shall have no authority to warrant any horses sold, and Jones shall have no right to make any purchase exceeding a thousand dollars in amount. But if Jones buys a consignment of horses for two thousand dollars, or Brown warrants a horse that he sells for the firm to be sound and kind, both members of the firm are jointly liable for the price, or for damages for the breach of the warranty, if the person with whom they were dealing had no knowledge of the want of authority, since such acts are within the usual course of business of a firm in that line of dealing (9).

§ 58. **Same: Trading and non-trading partnerships.** It should be borne in mind that there is a difference between the implied or apparent authority of trading and non-trading partnerships. This is particularly true as to giving notes in the name of the firm. A member of a non-trading partnership, such as a firm of physicians (10) or lawyers (11), has no implied authority to do this; and the same rule has been applied to partnerships of farmers

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(8) Banner Tobacco Co. v. Jenison, 48 Mich. 459, 462; Hoskinson v. Eliot, 62 Pa. St. 393, 400.

(9) See Sandilands v. Marsh, 2 B. & Ald. 673, 679; Fenn v. Harrison, 3 T. R. 757, 760.

(10) Crosthwait v. Ross, 1 Humph. 23. See Smith v. Sloan, below.

(11) Smith v. Sloan, 37 Wisc. 285, 296.

(12), publishers (13), tavernkeepers (14), and others. A partner who does not approve of an act that his associate is intending to do may avoid liability for it by going to the third person and notifying him of his dissent (15). If Brown does not approve of Jones' intended purchase of the horses, he may go to the seller and state that he refuses to be responsible for the purchase—unless, of course, the power to purchase horses is one expressly conferred by the articles of partnership.

§ 59. **Power to sell firm property: In general.** In a trading partnership, each partner ordinarily, as to third persons, has implied authority to sell any of the property of the firm. He has implied authority also to bind the firm by any act that is ordinarily incidental to the sale. Hence he has power, as above stated, to warrant the quality of the thing sold, and also to warrant that the firm has title to it, or that it is suitable for the purpose for which he sells it. He may warrant, for example, that a stallion "shall prove to be an average foal-getter" (16). A sale ordinarily implies a warranty of title to the property; and, if a partner sells property which the firm does not own, all the partners will be liable for breach of this implied warranty (17). This power to sell has usually been held to extend to a sale of all the property of the firm at once (18); al-

(12) Ulery v. Ginrich, 57 Ill. 531, 533.

(13) Pooley v. Whitmore, 10 Heisk. 629, 635-8.

(14) Cocke v. Mobile Bank, 3 Ala. 175, 179.

(15) Leavitt v. Peck, 3 Conn. 124, 128-9.

(16) Edwards v. Dillon, 147 Ill. 14, 23.

(17) Hartley v. Rotman, 200 Mass. 372, 376.

(18) Ellis v. Allen, 80 Ala. 515, 518; Crites v. Wilkinson, 65 Cal. 559, 560 (under California code); Schneider v. Sansom, 62 Tex. 201, 202.

though there are cases which hold that this rule does not apply where the firm was organized for non-trading purposes, where the property was to be kept for carrying on a particular business, such as horse breeding only (19), or farming and cattle-raising (20). Such instances, in case of a partnership of a kind that ordinarily involves trading in the things that the partner has sold, rest upon the purchaser's having express or implied notice that the partnership was for a non-trading purpose, or that there were limitations upon his authority to sell (21). This power of each partner to sell goods of the firm which are kept for sale, or which are of a kind ordinarily kept for sale by such a firm, includes the power to give a chattel mortgage (22).

§ 60. **Same: Doctrine of Locke v. Lewis.** In an important Massachusetts case decided in 1878 (23) five men formed a limited partnership under the name of one of them "& Co.," in which two were general partners and three special partners, for the business of carriage manufacturers. The two general partners owed money to a former partner of theirs in a previous partnership, for which they had given him their note. To pay this note they sold him three carriages, which formed a part of the stock in trade of the new firm, and gave him a receipted bill with the heading of the new firm Later a creditor of the new firm attached these carriages, and the purchaser

(19) Lowman v. Sheets, 124 Ind. 416, 418, 425.
(20) Cayton v. Hardy, 27 Mo. 536, 540.
(21) See Burdick on Partnership (2d ed.) 180.
(22) Hage v. Campbell, 78 Wisc. 572, 577.
(23) Locke v. Lewis, 124 Mass. 1, 18.

sued the deputy sheriff who made the attachment in an action of replevin to recover possession of them. The court held the case nearly five years under consideration, twice calling for re-argument. It was held that the sale by the two partners of firm property in payment of their own private debt passed title to the purchaser, where he acted in good faith, because the other partners had held out the ostensible partners as the sole owners of the property, had allowed them to deal with it as if it were their own, and had thus induced the purchaser to believe that the ostensible partners were the only persons interested in it. This case, which has sometimes been misinterpreted (24), rests upon the ground of estoppel and the familiar principle of agency referred to in § 57. The secret partners are bound by the acts of the ostensible partners. The fact that the firm was a limited partnership merely restricted the special partners' liability for firm debts; it did not charge the purchaser with notice of their membership in the firm, or restrict the powers of the ostensible partners in dealing with firm property kept for sale.

§ 61. **Power to incur contract liabilities: In general.** A partner who incurs a debt, by the purchase of goods or otherwise, in the name of the firm, binds the other members, if the incurring of the debt was within the scope of his apparent authority, although he had no actual authority to make it, and even if he had been forbidden to do so, provided the seller or other creditor had no notice of

(24) See discussion in Burdick on Partnership (2d ed.) 129-131; also Parsons on Partnership (4th ed.) 115, § 99.

his want of authority. Within the scope of his actual or apparent authority, he may bind the firm by a purchase on credit (25). The scope of his implied authority, as settled in § 56, depends upon the scope of the business. A member of a dry goods firm would ordinarily be held to make the firm responsible for a purchase of silks, though not of a steam road-roller.

§ **62. Same: Bills and notes.** One of the most well settled powers of a member of an ordinary trading partnership is to borrow money for the firm (26), and it is equally well settled that he has power to give a promissory note or draft or bill of exchange in the firm's name for money loaned or goods purchased (27). If he gave the note without the authority of his partners, and used the goods or money for his private purposes, the payee or any subsequent holder of the note can still hold the firm liable, if he took the note in good faith and without notice that it was not given for firm uses (28). A member of a non-trading firm, such as a firm of real estate and insurance brokers, does not have this implied authority (29). If Brown & Jones make a firm note payable to Brown, Brown cannot sue the firm upon it, because he can maintain no action against the firm at law; but if Brown sells it to a third person, indorsing it over to him, the indorsee may sue the firm upon it. And so if the note was signed by Brown in the name of the firm without Jones' consent

(25) Dickson v. Alexander, 7 Ired. (N. C.) 4.
(26) Rothwell v. Humphreys, 1 Esp. 406.
(27) Pinkney v. Hall, 1 Salk. 126; 1 Ld. Raym. 175.
(28) Redlon v. Churchill, 73 Me. 146, 149.
(29) Lee v. Fort Scott Bank, 45 Kans. 8.

(30). A partner has authority to indorse in the firm name a note payable to the firm, and the indorsement will bind the firm, unless the holder has express or implied notice that the indorsement was for the maker's accommodation, or to raise money for the partner individually, or otherwise not for firm purposes (31).

§ 63. **Same: Sealed instruments.** A contract under seal, such as a bond or power of attorney or release, should be signed by the partners as individuals, with a separate seal for each. If one partner signs for the firm in the firm name, the question arises whether his signing binds the firm. On this point there is much apparent conflict among the cases. The strict common law rule was that a partner had no implied authority to bind the firm by an instrument under seal. This is a branch of the general rule that an agent cannot execute a sealed instrument for his principal unless authorized by an instrument under seal: "it takes a deed to execute a deed" (32). But: (a) One partner may bind the firm by a release under seal discharging a partnership debt (33). (b) In most states an express power of attorney or authorization under seal is not necessary. An oral or written au-

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(30) Haldeman v. Middletown Bank, 28 Pa. St. 440. This assumes, of course, that the holder did not know that Brown signed the note for his own purposes.

(31) Tevis v. Tevis, 24 Mo. 535; National Bank of Commonwealth v. Law, 127 Mass. 72, 75.

(32) Russell v. Annable, 109 Mass. 72, 73-4; Harrison v. Jackson, 7 T. R. 207, 210.

(33) Pierson v. Hooker, 3 Johns, (N. Y.) 68.

thorization is enough (34). (c) In some states a sealed instrument given by one partner in the name of the firm will bind the others, if it was of a kind such as is usually given in the regular course of its mercantile business (35). (d) The instrument may bind the firm if the seal was unnecessary, as with a chattel mortgage (36), or a contract for the purchase of coal (37). (e) In many states the use of seals has been abolished: a bond or a power of attorney, for example, requires no seal, and, if a seal is put on, it is merely surplusage. In most such states any express oral or written authority is sufficient to enable a partner to bind the firm by signing such an instrument in its name.

But, except in a few jurisdictions, a partner has no implied authority to execute an instrument under seal. In taking a deed of real estate, particularly, the purchaser should see that the deed is signed by all the partners, or that express authority given to one to sign for the others is clearly shown. The deed should not be signed in the firm name.

§ 64. **Firm debts are debts of each partner.** If the retail firm of Jones & Brown owes the Smith Manufacturing Company for supplies furnished, and Brown also owes the butcher for meat, Brown's meat bill is not, of course, a debt of the firm; it is merely an individual debt

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(34) Cady v. Shepherd, 11 Pick. 400, 406; Smith v. Kerr, 3 N. Y. 144, 150. Even under the English common law rule, a sealed instrument executed by one partner in the presence of the others bound the firm. Ball v. Dunstorville, 4 T. R. 313.

(35) Straffin's Admr. v. Newell, T. U. P. Charlton (Ga.) 163, 165.

(36) Tapley v. Butterfield, 1 Met. (Mass.) 515, 517.

(37) Hocking v. Hamilton, 158 Pa. St. 107, 114.

of Brown's. But the debt to the Smith Company is not merely a debt of the firm; it is a personal debt of Jones and Brown individually and separately (38). Hence, if one member of the firm makes an assignment of his property for the benefit of the creditors of the firm, the assignment is as valid as if it were made for the benefit of a part of his individual creditors, and at common law defeats a subsequent attachment by a personal creditor (39). A firm creditor may sue both partners and attach the individual property of one, or garnishee a debt due to one partner only (40). A debt of the partnership is a debt of the members as individuals, and not the firm as a separate entity (41), although there are cases taking a contrary view (42). Firm debts and contractual obligations are said to create (apart from statutes to the contrary) a joint liability—not a several liability, or a joint and several one (43).

§ 65. **Liability for torts: In general.** The liability of partners for torts, however, is joint and several. If the firm becomes liable for a tort—that is, for a wrongful act independent of contract—the injured person need not sue all its members jointly, as he must for a breach of contract; he may sue any of its members who are liable for the tort (44).

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(38) This rests on the principles discussed in § 15, above.

(39) Newman v. Bagley, 16 Pick. (Mass.) 570, 572.

(40) Stevens v. Perry, 113 Mass. 380.

(41) Hallowell v. Blackstone Bank, 154 Mass. 359, 363.

(42) Buffalo Bank v. Thompson, 121 N. Y. 280, 283, for example.

(43) Burdick on Partnership (2d ed.) 152.

(44) Blyth v. Fladgate, [1891] 1 Ch. 337, 353; Wood v. Luscomb, 23 Wisc. 287, 290.

§ 66. **Same: For negligence.** If one of two partners in the grocery business is driving a team and runs over a man, or one of a firm of stevedores injures a man while working in unloading a vessel, both partners are equally liable; and suit may be brought against either the one who did the act, or against his absent partner alone, or against both (45). This rests upon the principle of the law of agency that a principal is liable for the act of his agent or employee or servant within the scope of his authority. Each partner being the agent of all the others, all are liable for his negligent acts, if they were within the scope of the business. But, while Jones is liable jointly and severally with his partner, Brown, for Brown's careless act in running over a man while driving the delivery wagon, it does not follow that Jones is liable if Brown runs over a child while driving with his wife in the family phaeton; nor if the injury is caused while Brown is using the delivery team to drive over to his doctor's office during the lunch hour. The partner, like the principal, is not liable for the other's acts done while the other, as said by Baron Parke in a well known English case, "was going on a frolic of his own" (46). This rule applies to other negligent torts besides personal injuries. If Brown & Jones are newspaper publishers, and Brown, in Jones' absence, publishes a false statement that a minister ill-treated his children, Jones will be liable jointly and severally with Brown. This will be true even if by statute it is necessary under

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(45) Wood v. Luscomb, above; Linton v. Hurley, 14 Gray (Mass.) 191.

(46) Joel v. Morison, 6 C. & P. 501.

the circumstances for the plaintiff to prove that the article was published with malicious intent; Jones will be liable, if Brown published the article with actual malice (47). The same rule should apply if Brown thinks a clerk has been stealing the funds of the firm, and, without probable cause, mistakenly procures his arrest. But there are authorities holding that Jones would not be liable in such a case, unless he himself authorized the arrest, on the ground that the firm is not liable for a partner's "wilful tort," or that the prosecution of the clerk was not within Brown's implied authority (48).

§ 67. **Same: For fraud.** The same rule applies to fraudulent torts as to negligent ones: if the fraudulent act of one partner was done for the benefit of the firm and was within the scope of its business, all the partners are liable. It is no answer to say that the partner was not authorized to commit a fraud, if the act which he did fraudulently was an act within the scope of the business (49). Suppose Brown & Jones are a firm of lawyers, and make it a part of their business to invest money for their clients under specific instructions. A woman brings in five thousand dollars to invest in a particular mortgage, about which she has talked with Brown. Brown takes the money and uses it for speculations of his own. In such a case, Jones may be liable to the client, though he never saw or heard of her (50). But ordinarily, in cases

(47) Lothrop v. Adams, 133 Mass. 471, 478-82.

(48) Rosenkrans v. Barker, 115 Ill. 331, 338; Strang v. Bradner, 114 U. S. 555, 561.

(49) Morehouse v. Northrop, 33 Conn. 380, 389; Banner v. Schlessinger, 109 Mich. 262, 264.

(50) Shumaker on Partnership (1st ed.) 315-16, and English cases cited.

of the misapplication of trust funds, the money is not received by the firm in the course of its business, and, hence, the innocent partner is not liable, even if the money is used for firm purposes without his knowledge (51).

§ 68. **Liability for crimes.** A criminal act, committed by one partner without the authorization of the others, does not ordinarily make the others criminally liable. Except under special statutes or in peculiar cases, no person is punishable for crime unless he had a criminal intent (52).

§ 69. **Liability for acts of agents and employees.** Like any other principals, the members of a partnership are liable for the acts of their agents and employees, within the scope of their actual or apparent authority. If the firm's buyer orders goods, or if its teamster runs a man down in the street, the partners are responsible, as much as if they had done the thing themselves, provided that the employee was acting on the firm's business and not on a "frolic of his own" (53).

§ 70. **What partners are bound?** The general rule is that all members of a firm are liable for the acts of any partner or employee, within the scope of his actual or apparent authority. They are jointly liable on his contracts, and jointly and severally liable for his torts. They are not ordinarily criminally responsible for his criminal acts. This liability binds dormant, secret, nominal, or

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(51) Gilruth v. Decell, 72 Miss. 232, 234-5; Englar v. Offutt, 70 Md. 78, 90.

(52) Watson v. Hinchman, 42 Mich. 27, 29.

(53) Dunn v. Hall, 1 Ind. 344, 355 (libel); Locke v. Stearns, 1 Met. 560, 563.

special partners, as well as the ostensible members of the firm (54). If Jones, of the clothing firm of Smith, Brown, Jones & Robinson, buys an order of goods from Thompson, Thompson supposing him to be acting for himself alone, and later Thompson finds out that Jones was a member of this firm and bought the goods for it, Thompson may hold all the partners liable for the price, as undisclosed principals. It makes no difference that Thompson charged the goods to Jones personally, unless, after finding out about the firm, he has definitely elected to charge them to Jones (55).

§ 71. **Extent of liability.** Aside from special partners in limited partnerships, each partner is liable for the whole of a debt, and for all the damages for a breach of contract or a tort. In a suit on a debt or contract, all the partners must be joined; but, if the plaintiff gets judgment against them all, he may collect the whole by levying his execution on the individual property of one. The partner who, voluntarily or involuntarily, pays the debt or the damages for breach of contract, has a right of contribution against each of the others for his proportionate share (56). The question whether a partner, who satisfies an obligation incurred through a tortious act on his part, may claim contribution from the others is one of some difficulty. The general rule is that he may, if the act was not wilful or exceptionally negligent (57). If he pays a judgment for

(54) Locke v. Lewis, 124 Mass. 1.

(55) Griffith v. Buffum, 22 Vt. 181, 183-4.

(56) Stout v. Baker, 32 Kans. 113.

(57) Horbach's Admrs. v. Elder, 18 Pa. St. 33, 36; Adamson v. Jarvis, 4 Bing. 66.

personal injuries caused by the acts of an employee, he may of course claim contribution (58).

§ 72. **Assuming prior obligations.** If Brown & Jones take in a new partner, Smith, is Smith liable with the others to a man who has sold the firm a bill of goods a month before he became a member? Ordinarily he is not (59). If he agrees to assume part or all of the debts of the old firm, he is liable to his partners if he fails to pay his share of them; and in some jurisdictions he becomes liable directly to the creditor, if the debts he agreed to assume definitely included that creditor's claim (60). This latter result rests upon a doctrine in contract, by which a beneficiary of a contract may often sue on it. See Contracts, §§ 92-100, in Volume I of this work.

§ 73. **Liability after retirement or dissolution.** Whether an outgoing partner is responsible to future creditors of the new firm formed by his former associates after his retirement, depends upon whether he still permits himself to be held out as a partner. To escape liability, a retiring ostensible partner should give notice of his retirement to all persons who have had dealings with the firm, and also notify, by publishing a newspaper notice or in some other way, the public who have had knowledge of his membership in the firm, though not dealings with it (61).

§ 74. **Suits by and against third persons.** As previ-

(58) Horbach's Admr. v. Elder, above.

(59) Conner v. Mackey, 147 N. Y. 574; Penn v. Fogler, 182 Ill. 76.

(60) Arnold v. Nichols, 64 N. Y. 117.

(61) Lovejoy v. Spafford, 93 U. S. 430.

ously stated (62), except where statutes provide otherwise, suits by or against the firm should not be brought in the firm name, but in the names of the partners as individuals. Dormant and nominal partners need not be joined as partners, but all actual and ostensible partners at the time when the cause of action arose must be included (63) in suits by the firm in contract or tort, or in suits against the firm for breach of contract. As shown above, in suits against the firm in tort any or all of the partners may be sued. There is some text-book authority for an exception to this rule when the tort grows out of their common interest in some parcel of land, in which case it is said that all must be made defendants (64). The reasons that prevent partners from suing each other, except for an accounting, operate at common law to prevent actions between firms having a common partner (65). Under modern codes of procedure there is some conflict in the authorities as to whether such an action is maintainable for a debt due one firm from the other, or for an injury done to one by the other (66).

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(62) § 15.

(63)) Seymour v. Western R. Co., 106 U. S. 320, 321; Goggin v. O'Donnell, 62 Ill. 66.

(64) 1 Lindley on Partnership (2d Am. ed.) 283.*

(65) Bosanquet v. Wray, 6 Taunt. 597, 605.

(66) Cole v. Reynolds, 18 N. Y. 74, 77-8; Crosby v. Timolat, 50 Minn. 171, 173-4.

CHAPTER V.

TERMINATION. DISTRIBUTION OF ASSETS OF SOLVENT PARTNERSHIP.

§ 75. **Dissolution by operation of law.** A partnership may be dissolved in three ways: by act of the parties, by operation of law, and by order of court.

Dissolution by operation of law occurs (1) by the death of a partner; (2) by a partner or the firm being adjudged bankrupt or insolvent; (3) by the business of the partnership ceasing to be lawful. A fourth instance is given in the text-books, in cases at common law where a woman partner marries. But under the modern statutes authorizing married women to hold property and make contracts, as if unmarried, this is no longer true; except that where a man and woman marry, in states where husband and wife cannot make valid contracts with each other, the partnership would be held to be dissolved. Another instance is perhaps a conviction of a partner for felony (1).

§ 76. **Same: In detail.** The death of a partner immediately dissolves the firm, just as the death of a principal terminates the authority of an agent (2). As to real es-

(1) Vail v. Winterstein, 94 Mich. 230; Little v. Hazlett, 197 Pa. St. 591; Brown v. Chancellor, 61 Tex. 437.

(2) Ex parte Ruffin, 6 Ves. 119, 126; Nelson v. Hayner, 66 Ill. 487, 490.

tate owned by the partnership, the share of the deceased partner at common law passes to his heirs, subject to a trust in favor of the partnership until the partnership debts are paid (3). This rule has been changed by statute in some states. Provisions in the partnership articles for the continuance of the business after a death create a new partnership at that time, and do not actually continue the old one (4). The executor of a partner cannot be compelled to take advantage of a provision authorizing him to take the partner's place upon his death (5). An adjudication of the bankruptcy of one partner, under a national bankruptcy law (6), or of his insolvency, under a state insolvency law (7), dissolves the partnership, though no notice to creditors be given. If the firm executed an assignment for the benefit of creditors, this operates as a dissolution (8). If one partner makes a general assignment for the benefit of creditors, the effect in most jurisdictions is the same (9). If the business becomes unlawful, the effect is to terminate the partnership. So a firm of lawyers is dissolved if one member accepts a judgeship which by statute incapacitates him from practising (10). A statute making the business of stock-brokerage illegal would probably dissolve all existing firms of brokers. Whether the passage of an anti-monopoly act, applicable

(3) Dyer v. Clark, 5 Met. 562, 576-9.

(4) Wilcox v. Derickson, 168 Pa. St. 331, 335; Hoard v. Clum, 31 Minn. 186, 188.

(5) Stewart v. Robinson, 115 N. Y. 328, 333.

(6) Eustis v. Bolles, 146 Mass. 413, 414.

(7) Saloy v. Albrecht, 17 La. Ann. 75.

(8) Wells v. Ellis, 68 Cal. 243, 244.

(9) Ogden v. Arnet, 29 Hun 146, 148. See § 77.

(10) Justice v. Lairy, 19 Ind. App. 272, 276.

to the firm as an illegal combination, would have that effect is a question of some difficulty. War between countries of which various members of the firm are residents at least suspends, and probably dissolves the partnership (11); although instances may be imagined where this might not necessarily be true, such as partnerships to act as agents for a principal in a neutral country, or perhaps partnerships in occupations not involving commercial intercourse between the hostile countries.

§ 77. **Dissolution by act of parties.** A partnership formed for a specific time is dissolved when the time expires (12), or, like any other partnership, it may be dissolved at any time by mutual agreement (13). A partnership formed for a particular transaction, as, for instance, for dealing in a particular purchase of eggs, or building a particular bridge, terminates when the transaction is completed (14). If any partner withdraws from the firm, or sells out his interest, or his interest is sold by the sheriff on execution, the effect, in most American jurisdictions, is to dissolve the partnership (15); although a mere attachment of his interest would not have that effect. An assignment of his interest in trust for creditors in most states effects a dissolution (16), and, as shown in § 76, an involuntary assignment by the appointment of

(11) Griswold v. Waddington, 15 Johns. 57, 84; affirmed 16 Johns. 438, 492.

(12) Phillips v. Reeder, 18 N. J. Eq. 95, 97-8.

(13) Montreal Bank v. Page, 98 Ill. 109, 119.

(14) Bohrer v. Drake, 33 Minn. 408, 410.

(15) Avery v. Craig, 173 Mass. 110; Moore v. Steele, 67 Texas, 435, 439; Blaker v. Sands, 29 Kans. 551.

(16) Davis v. Megroz, 55 N. J. Law, 427, 430-1.

a trustee in bankruptcy has the same result. If the partnership was for a fixed term, however, it may be urged that neither partner can terminate it by voluntary act before that term expires. If the firm of Brown & Jones by the partnership articles is to continue for five years, has Brown power to withdraw from the firm before the expiration of that term? If he does withdraw, it will be a breach of his contract; but will his withdrawal be effective? If he cannot withdraw voluntarily, will an involuntary assignment of his interest by levy of execution result in a dissolution? Is there such a thing as an indissoluble partnership? In England and in several states it is held that a partner has not power by his own act to dissolve the firm (17). But the weight of American authority is that Brown may dissolve the firm by withdrawing, however wrongfully, at any time he likes. While he may thus end the partnership, he may be made to pay damages for breaking his agreement (18). In case a new member is admitted, the old partnership is thereby dissolved and a new one formed (19), even if the new partner is a son of one of the former members and the partnership articles provide that he shall be admitted on reaching twenty-one.

§ 78. **Dissolution by order of court.** A court of equity has power to dissolve a partnership, order an accounting between the partners, enjoin the members of the firm from disposing of its assets, and appoint a receiver. The

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(17) Burdick on Partnership (2d ed. 1906) 346-7.

(18) Mechem's Elements of Partnership, §§ 239-242; Solomon v. Kirkwood, 55 Mich. 256, 259.

(19) Peters v. McWilliams, 78 Va. 567, 571.

principal ground on which a partnership has been declared dissolved is the commission of some act showing serious intentional misconduct, hostility, or want of good faith on the part of the defendant partners (20). Other grounds are fraud in the formation of the partnership (21), insanity of a partner (22), perhaps his permanent incapacity through paralysis (23), and circumstances which show that there is no hope of continuing the business with success (24).

§ 79. **Notice of dissolution.** Except where a partnership is terminated by operation of law, as by death, war, or an adjudication of bankruptcy or insolvency (25), it is important that notice of dissolution should be promptly given. Notice should be given even where the partnership has been declared dissolved by a decree of court (26), unless the decree declares that no valid partnership has ever existed (27). The necessity of giving notice, in order to terminate the liability of a retiring partner to persons who continue to deal with the firm without knowledge that he is no longer a member, has been pointed out in the preceding chapter (28). As there stated, it is nec-

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(20) Groth v. Payment, 79 Mich. 290, 293; Einstein v. Schnebly, 89 Fed. 540, 552-3.

(21) Richards v. Todd, 127 Mass. 167.

(22) Raymond v. Vaughn, 128 Ill. 256, 263. Even the appointment of a guardian does not of itself dissolve a partnership, though there is some authority to the contrary: Isler v. Baker, 6 Humphr. 85.

(23) Whitwell v. Arthur, 35 Beav. 140.

(24) Rosenstein v. Burns, 41 Fed. 841.

(25) Marlett v. Jackman, 3 Allen 287, 289-96; Eustis v. Bolles, 146 Mass. 413, 414-5.

(26) Mechem's Elements of Partnership, 164, § 260.

(27) See 30 Cyc. 671, art. "Partnership," IX, B, 6, a.

(28) § 73, above.

essary to give actual notice in some way, orally, by telephone, by mailing a notice which is actually received (29), to persons who have actually had dealings with the firm; and constructive or general notice, usually given by publication, to the public who had knowledge of its existence. What notice is sufficient to discharge a retiring ostensible partner from liability, depends on the nature and extent of the business, and the local usage as to giving such notices (30).

§ 80. **Disposal of assets.** On the dissolution of a solvent partnership, how are its assets to be disposed of? Suppose the firm of Brown & Jones is about to dissolve. Brown originally put in $10,000 capital and Jones $5,000. Each was to give his whole time to the business, and Brown was to have three-fifths of the profits. During a period of panic some years ago, Brown advanced $2,000 to the firm, on which interest has been paid. The assets of the firm are $35,000, and it owes $10,000 on various accounts outstanding. After paying the $10,000 due to the firm creditors, and the $2,000 due Brown for money advanced, there remains $23,000. Of this sum $10,000 goes to Brown and $5,000 to Jones to repay their shares of the capital, and the balance, $8,000, is divided as profits, $4,800 to Brown and $3,200 to Jones. Suppose the firm had only $25,000 assets instead of $35,000. The debts must first be paid in full, and next the money advanced by

(29) Austin v. Holland, 69 N. Y. 571, 576; Meyer v. Krohn, 114 Ill. 574, 585.

(30) Compare Solomon v. Kirkwood, 55 Mich. 256, 260-1, point II, with Citizens' Bank v. Weston, 162 N. Y. 113, 120; Lovejoy v. Spafford, 93 U. S. 430, 440.

Brown. This leaves $13,000 to be divided, two-thirds of which goes to Brown and one-third to Jones, in partial repayment of the capital (31). The distribution may of course be affected by previous agreements between the partners. They may have agreed that on dissolution each partner shall be credited with interest on his capital at a certain rate, that profits shall be divided like capital, or that advances shall or shall not bear interest. If there is not enough money left after paying the firm debts to repay more than $1,200 of Brown's advance, Brown and Jones must stand the loss equally; that is, Jones must pay Brown $400 of the $800 loss (32).

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(31) Molineaux v. Raynolds, 54 N. J. Eq. 559, 567.

(32) Nowell v. Nowell, L. R. 7 Eq. 538, 541.

CHAPTER VI.

BANKRUPTCY OR INSOLVENCY. DISTRIBUTION OF ASSETS.

§ 81. **Difference between bankruptcy and insolvency.** Under the constitution of the United States, Congress has power to pass a national bankruptcy act. This power has been four times exercised: by the act of 1800, repealed in 1803; by that of 1841, repealed in 1843; by the act of 1867, repealed in 1878; and by the act of 1898, now in force. During the intervals between the national bankruptcy acts, many states provided for the distribution of the assets of bankrupt persons by local insolvency laws. Under the national bankruptcy act of 1898 (1) a partnership is so far recognized as a legal personality that it may be adjudged bankrupt in voluntary or involuntary proceedings. The court administers and distributes the assets of both the firm and the individual partners. If any partner is found not to be bankrupt, the firm property will not be administered in bankruptcy without his consent (2), but he will be left to pay the partnership debts, settle the business, and account for the interests of the bankrupt partners. The general rule in bankruptcy and insolvency proceedings is that an adjudication of bankruptcy or insolvency made within four months after an

(1) Act of July 1, 1898, c. 541, § 5a.
(2) § 5h.

attachment, levy of execution, or other lien obtained through legal proceedings, or after the giving of a preference to a creditor by a transfer of property, or by permitting a judgment lien to be obtained, discharges the lien, or preference (3).

§ 82. **Distribution of assets in case of insolvency: General rule.** The scope of this article does not permit a full discussion of the rules that govern the many complex cases involving the distribution of the assets of an insolvent partnership. It can only attempt to state the leading principles which regulate the distribution, whether made by a court of equity in winding up the partnership affairs, or by a court of bankruptcy or insolvency (which is in its nature also a court of equity) in voluntary or involuntary proceedings. The national bankruptcy act of 1898 provides (4):

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. The court may permit the proof of

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(3) §§ 60a, 60b, 67c, and 67f; and amendatory act of Feb. 5, 1903.

(4) §§ 5f, 5g.

the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estates and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

This rule, that partnership assets are to be applied first to pay partnership debts and individual assets applied first to pay individual debts, is the fundamental principle of distribution in cases of insolvent partnerships. It does not mean that creditors of individual partners cannot have the firm assets applied to pay their debts, if they are more than enough to pay the debts of the partnership business, nor that firm creditors are excluded from participation in the assets of the individual partners, if they are more than enough to pay their individual debts (5).

§ 83. **Same: Comment and illustration.** It has been pointed out that it is difficult on principle to sustain this rule; for, as every partner is personally liable out of his individual property for the debts of the firm, there seems to be no reason why, on distribution of the assets of an insolvent firm, the individual creditors should have a preference as to the individual assets (6). But the rule as quoted from the bankruptcy act of 1898 is declaratory of the general law. Under this rule, suppose that Brown & Jones are in an insolvent condition, and a receiver is appointed to wind up the firm, at the suit of one of the

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(5) Murrill v. Neill, 8 How. 414, 425-6; Rodgers v. Meranda, 7 Ohio St. 179, 181-191.

(6) Mechem's Elements of Partnership, 192, § 294. Compare Rodgers v. Meranda, 7 Ohio St. 179, 183-4.

partners, or of a creditor. There are partnership assets amounting to $21,000. The firm owes debts amounting to $50,000. Brown has individual assets worth $10,000 and owes personal debts amounting to $20,000. Jones has individual assets of $12,000, and owes personal debts amounting to $4,000. Under these circumstances the partnership debts will exhaust the partnership assets, each firm creditor receiving a dividend from the firm assets of 42%. The individual debts of Brown exhaust his individual assets, each of his personal creditors receiving a dividend of 50%. Jones' personal creditors are paid in full, and $8,000 is left to apply to the payment of the partnership creditors, giving them an additional 16%, or 58% in all.

§ 84. **Same: Exceptions to general rule.** The principal exceptions to the rule are founded on the principle that debts between the partners, for loans or advances from one to the other or to the firm, are generally postponed in favor of debts to outside creditors, and on the principle, adopted in most jurisdictions, that the general rule is applicable only where there are two funds. Hence, where there are no firm assets, and none of the partners is fully solvent, the individual creditors have no prior claim upon the individual assets, but all share equally (7). There is however some authority to the contrary (8). As to claims by partners, a debt due a partner from the firm

(7) Conrader v. Cohen, 121 Fed. 801; Pahlman v. Graves, 26 Ill. 405; Harris v. Peabody, 73 Me. 262; Alexander v. Gorman, 15 R. I. 421; Thayer v. Humphrey, 91 Wisc. 276.

(8) Warren v. Farmer, 100 Ind. 593, 595 (dictum); Matter of Gray, 111 N. Y. 404, 408 (dictum).

will not share in the firm assets with the debts due firm creditors, unless it was a debt due the partner in a separate business carried on by him (9). A debt due the firm from a partner will not share in his individual assets with the debts due to his individual creditors, unless the debt arises from a fraudulent misappropriation by him of the partnership property, or is due from him in respect to a separate business carried on by him (10). A debt due from one partner to another, in the distribution of his individual assets, will be postponed to both firm and individual debts due from him, unless it appears that the debt due the partner is not competing with debts due partnership creditors (11). If a man is doing business in his own name, apparently as an individual, but actually is associated with several dormant partners, a firm creditor may proceed against the dormant partners as undisclosed principals, and the dormant partners cannot require him to exhaust the firm assets first (12).

§ 85. **Effect of bankruptcy of a partner.** As stated in the preceding chapter (13), the effect of one partner's being adjudicated a bankrupt is to dissolve the firm by operation of law. Some authorities hold that the trustee in bankruptcy becomes a tenant in common with the solvent partners: the title to the bankrupt's interest in the firm property passes to him as the bankrupt partner's

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(9) Ex parte Sillitoe, 1 Glyn & J. 374, 382-4.

(10) Harmon v. Clark, 13 Gray 114, 122-3; Cowan v. Gill, 11 Lea 674, 686-7; Ex parte St. Barbe, 11 Vesey 413, 415.

(11) Amsinck v. Bean, 22 Wall. 395, 402-4. The rules of priority are clearly summarized in Shumaker on Partnership (2d ed.) 227-39.

(12) See Whitworth v. Patterson, 6 Lea 119, 123.

(13) § 75.

successor, and, if he has possession of it, he is entitled to retain possession, and may be allowed to settle the affairs of the firm (14). Other authorities hold that the title remains in the solvent partners, and they alone have the right to wind up the firm business (15). This is the rule under the national bankruptcy act of 1898.

§ 86. **Can a firm be insolvent if one partner is not?** In some states it is held that as long as one partner remains solvent and is ready to settle the business and pay over the insolvent partners' share to their assignees or trustees, the court of insolvency has no jurisdiction to declare the firm insolvent (16). Under the national bankruptcy act of 1898, as pointed out above (17), the court has power to declare the partnership bankrupt, but will leave the administration to the solvent partners if they wish it. Under this act there has been much conflict of authority as to whether the partnership may be treated as insolvent when any of its members remain solvent. The better opinion is that it may (18).

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(14) Wilkins v. Davis, 2 Lowell, 511, 515-8; Murray v. Murray, 5 Johns. Ch. 60, 70.

(15) Ogden v. Arnot, 29 Hun 146, 148-9; Russell v. Cole, 167 Mass. 6, 10.

(16) Russell v. Cole, 167 Mass. 6, 10.

(17) § 81.

(18) In re Bertenshaw, 157 Fed. 363, 371-3. Compare Tumlin v. Bryan, 165 Fed. 166, 168.

CHAPTER VII.

LIMITED PARTNERSHIPS. JOINT STOCK COMPANIES.

SECTION 1. LIMITED PARTNERSHIPS.

§ 87. **Nature of a limited partnership.** A limited partnership is one in which certain members, known as special partners, are not liable for the obligations of the firm in tort or contract, except to the extent of the capital they have put in. At common law, all partners are responsible for all the debts and other liabilities of the firm. Limited partnerships, the conception of which is borrowed from the civil law, are wholly founded upon statutes (1).

§ 88. **Statutory requirements.** The statutes of the various states regulate strictly the conditions under which a limited partnership may be formed. Many states require the recording of a certificate setting forth the names and residences of the partners, and the amount each contributes to the capital. Most states require publication of either the certificate or a notice. The special partner's contribution, which must usually be in cash, must be actually paid in before business is begun. In some states the special partner's name must not appear in the firm name, nor must the words "& Co." be used. In others a

(1) Ames v. Downey, 1 Bradf. (N. Y.) 321; Clapp v. Lacey, 35 Conn. 463.

sign must be posted stating the names of the general and special partners (2).

§ 89. **Effect of non-compliance.** The statutory requirements must be substantially (or, some cases hold, strictly) complied with, or all the members will be liable as general partners (3). In general, except for the limited liability of the special partners, the law of limited partnerships is the same as that governing other partnerships

§ 90. **Dissolution and notice.** Where the certificate or notice, as usually is required, states the duration of the intended partnership, the partnership expires at the end of that period, and notice of dissolution is not necessary (4). If continued after this period without renewal by a fresh publication, the special partners become liable as general partners (5).

Section 2. Joint Stock Companies.

§ 91. **Organization: At common law.** In an ordinary partnership, each member of the firm has a right to say who shall be the other members, and any introduction of a new partner dissolves the firm. This right may be limited by the articles of partnership, which sometimes provide, for example, that a partner may have a son admitted as a member of the firm on his attaining a certain age (6). This consent to a substitution of partners may

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(2) For a detailed analysis of the statutes of all the states, see George on Partnership, 423-497, §§ 189-230.

(3) Pierce v. Bryant, 5 Allen (Mass.) 91, 94; White v. Eiseman, 134 N. Y. 101, 103-4.

(4) Haggerty v. Taylor, 10 Paige (N. Y.) 261.

(5) Columbia Bank v. Berolzheimer, 33 App. Div. (N. Y.) 235, 238.

(6) See Jones's Forms in Conveyancing (5th ed.) 612-3.

be given in general terms; and hence partnerships with transferable shares, sometimes called joint stock companies, may be organized. Such partnerships are in many ways like corporations, often having elaborate articles of organization, and bylaws providing for the management of the business by officers elected by the members, who vote according to the number of shares they own. Such organizations exist at common law in some of the New England states, where they frequently are known as "real estate trusts," being used chiefly for the management of office buildings and other city property. The money subscribed is spent in the purchase of land and the erection of buildings, the legal title to which is held by a board of trustees, subject to the direction of the stockholders (7). The formation of such trusts sometimes raises difficult questions as to their validity under the rule against perpetuities and the rules against restraints on alienation. It should be expressly provided that the death of a member or the transfer of his shares shall not effect a dissolution.

§ 92. **Same: Under statutes.** In some states the formation of such organizations is regulated by statute, and there may be thus created an organization which is neither a "voluntary organization," a partnership, nor a corporation, but has some of the characteristics of each. Unless the statute expressly so provides, however, the liability of each shareholder for partnership torts, debts, and other obligations is unlimited, and in general the

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(7) Phillips v. Blatchford, 137 Mass. 510, 512.

ordinary principles of partnership law control (8). The attempt is sometimes made to restrict the shareholders' liability by inserting in the articles of association, and in each contract, a provision that the person contracting with the association shall look only to the funds in hand for payment (9). The English joint-stock company, a limited liability association, organized under statutory authority and required to use the word "limited" as part of its name, is not properly a partnership, but is very similar to the American corporation. In England the word "corporation" is usually applied only to municipal corporations and to certain long established guilds and other companies.

§ 93. Authorities on the law of partnership. The present article in its limited space can give only a general outline of the law of partnership. The leading English textbooks on the subject are Lindley on Partnership (1860) and Collyer on Partnership, the second edition of which was published in 1840. Sir Frederick Pollock's Digest of the Law of Partnerships (1877) became in its later editions a commentary on the English partnership act of 1890, which was drafted by the author. Underhill on Partnership (1899) is a short series of lectures to law students.

The first important American work on the subject was Story on Partnership (1841). Professor Theophilus Parsons's treatise was published in 1867, and a fourth edition,

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(8) Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147, 150-1; Moore v. May, 117 Wisc. 192, 204, point 8.

(10) Imperial Co. v. Jewett, 169 N. Y. 143, 150.

revised by Professor Joseph H. Beale, in 1893. "Elements of Partnership" (1896) revised by Professor Floyd R. Mechem from a course of lectures, presents a remarkably clearly reasoned discussion of the theory of partnership law. Professor Francis M. Burdick's "Law of Partnership" (1899, 2d ed. 1906) is a book of much importance, especially valuable on doubtful and controverted points. Shumaker on Partnership (1901, 2d ed. 1905) is an excellent practical treatise, very clearly arranged. Among other American works on the subject are Bates on Partnership (1888); George on Partnership (1897); "An Exposition of the Principles of Partnership" (1889) by Professor James Parsons, which maintains a theory of the nature of a partnership (that the relation is founded on the common interest in the partnership property) which is not generally adopted; Troubat on Limited Partnership (1853); and Bates on Limited Partnership (1886).

PRIVATE CORPORATIONS

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§ 1. **Outline.** This subject will be treated in the following order: Chapter I. The general nature of a corporation: 1. Definition and history. 2. The corporation as a person. 3. The corporation as a collection of individuals. 4. The corporation as a franchise. 5. Corporations and other institutions. 6. Tests of corporate existence. 7. Classes of corporations. Chapter II. Creation of corporations: 1. The state's functions. 2. The promoter's functions. 3. The corporate charter. 4. The association agreement. 5. Organization. Chapter III. The body corporate: 1. Members and organs of action. 2. Internal relations. 3. Corporate funds. 4. Corporate name. 5. Corporate life. 6. Corporate death—dissolution. Chapter IV. Corporate powers and liabilities: 1. Powers in general. 2. Classes of cor-

porate powers. 3. Particular powers. 4. Ultra vires. 5. Torts and crimes. Chapter V. The corporation and the state: 1. The state and its own corporations. 2. The state and national corporations. 3. The state and foreign corporations. 4. The national government and state corporations. Chapter VI. Special relations: 1. The corporation and its promoters. 2. The corporation and its officers. 3. The corporation and its shareholders. 4. Corporate creditors.

CHAPTER I.

GENERAL NATURE OF A CORPORATION.

Section 1. Definition and History.

§ 2. **Definitions.** In a recent opinion Judge Baldwin says: "A private corporation may be defined as an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued, and who have accepted the offer and effected an organization in substantial conformity with its terms" (1). There are three leading ideas in the definition of a corporation, each of them being important in certain circumstances. These ideas are: *A person*—"a corporation is an artificial being invisible, intangible, and existing only in contemplation of law;" *a collection of persons*—a corporation aggregate is a "collection of many individuals united into one body, under a special denomination, having perpetual succession in an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual;" *a franchise*—"a corporation is a franchise possessed by one or more individuals, who subsist as a

(1) Baldwin C. J. in Mackay v. New York & N. H. R. Co., 72 Atl. 583, 586 (Conn).

body politic, under a special denomination, and are vested by the policy of the law with the capacity of perpetual succession and of acting in several respects, however numerous the association may be, as a single individual" (2).

§ 3. **Theories of the corporate personality.** There are three of these, viz: (a) The *fiction* theory, i. e., that the corporate personality is not *real* but *artificial* only: "The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech" (3). This is the currently accepted American view, and is specially insisted upon by Mr. Morawetz and Mr. Taylor.

(b) The *organic* theory: This is the German doctrine. This view is that the corporation has a personality as *real* as that of the state; that in law a *person* is anything that is a distinct subject of rights and liabilities. "Juristic persons are no more fictitious than, say, the conception of ownership is fictitious. In the eye of the law they are in the fullest sense *persons*, that is, subjects of legal rights and duties, and to that extent *'real,'* as far as modern law is concerned" (4).

(c) The *representative* theory: This may be summarized as follows: The rights held by a corporation are not the rights of any physical person, but those of the corporation as a distinct person in the law; the act of the

(2) 2 Kent, Commentaries, 257.

(3) Judge Finch, in People v. North River Sugar Refining Co., 121 N. Y. 582.

(4) Sohm, Institutes of Roman Law (2d ed.), 204, note.

majority is accepted as the act of all and those who act bind those who are silent; in other words, the majority vote of the quorum is the *representative* of all, and this is true whether the vote has been by A to X, inclusive, or by B to Y, inclusive, in a corporation composed of A to Z. Any group that is the majority of the quorum is the representative of the corporation and is no *unreal* thing; the will of this representative body duly expressed is the corporate act or will, whether it be of knowledge, ignorance, error, good or bad faith, or wrong doing or commendable action. This makes up the *unity* of the *corporation,* which it is convenient, if not entirely necessary, to treat as a person in the law (5).

§ 4. **Theory of the collective body.** Mr. Morawetz says: "The word corporation is but a collective name for the corporators or members who compose an incorporated association" (6). Mr. Taylor says: "A corporation considered as a legal institution has two meanings: (1) The sum or mass of the legal relations subsisting in respect to the legal enterprise among the various parties—the state, the shareholders, the officers, and the creditors—resulting from the operation of the rules of law embraced in the corporate constitution; (2) the shareholders, vested with the corporate powers, since it is through their acts or the acts of their predecessors that incorporation is caused" (7). Mr. Trapnell analyzes the subject and concludes: "A corporation is an association of individuals,

(5) Professor Ernst Freund, The Legal Nature of a Corporation.

(6) Private Corporations (2d ed.), § 1.

(7) Corporations (3d ed.), §§ 36, 37, 49, 50, 51.

formed under the sanction of the state, for the accomplishment of a distinct and definite purpose"—these being the three essential elements. The association originates in an agreement between individuals, which becomes effective only by the express sanction of the state; this association is peculiar in that its rights and liabilities persist unchanged without regard to changes in membership; membership is acquired by original subscription, or agreement, or subsequent ownership of stock, and is terminated by assignment of stock; the association is dissolved, voluntarily with the consent of the state, or, on complaint of shareholders or creditors, for various improper acts. The states's sanction is essential, and is expressed in a general or special legislative act, which operates as a grant of corporate power to the associates, constituting a contract with them, and a law prescribing the form and mode of exercising these powers, and the results thereof. These powers are given only for the purpose of accomplishing the expressed objects, through the forms prescribed, by means of the funds authorized (8).

§ 5. **Theory of the franchise.** Blackstone says: "Franchises are a royal privilege or branch of the king's prerogative subsisting in the hands of the subject;" and "it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, and each individual member of such corporation is also said to have a franchise or freedom." Mr. Justice Bradley, after quoting this, says: "Generalized and divested of the

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(8) The Logical Conception of a Corporation, by Benjamin Trapnell.

special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not be exercised by private individuals at their mere will or pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise'' (9). The state in its political capacity is the holder of all franchises, in trust for the public welfare; and when it makes a grant of any such franchises they do not lose their public character, but are yet to be exercised in advancing the public welfare; this is an essential, though implied, condition of the grant; if not performed the state can resume the grant as for a condition broken. The right to be and act as a corporation, mainly based upon historical reasons, is considered, and wisely so, as a right or privilege of public concern. This is true even though the business to be done is of a private nature, such as refining sugar or oil. The business is neither more nor less public than if done by individuals in their private capacity, but the privilege consists in bringing into existence and using in the business the valuable, efficient, impersonal, and in many ways less responsible agency, known as the corporation; this is the matter of public concern, which is the essence of the corporate franchise.

(9) California v. Central Pacific Ry. Co., 127 U. S. 1, 40.

The corporate franchises are frequently said to be *primary* and *secondary*. The primary franchise is the privilege to be, to exist and act as a corporation; the secondary franchises are such other franchises or special privileges, such as the right to take property by eminent domain, as may be conferred upon the corporation, just as they might be conferred upon natural persons.

§ 6. **History of these ideas. The corporate personality.** Hearn and Coulanges trace the idea of corporate personality to the ancient family group, which was a permanent body, enduring forever, with rights and duties distinct from those of its individual members, who included both the living and dead, and whose representative and managing director was the house father. In the earliest stages of human development, the existence of tribes, village communities, families, clans, and nations was recognized in such a way as to imply they were collective entities with corporate rights and duties. In the ancient Babylonian and Egyptian law, the Temple was personified (10). Long before Justinian, the rule of the Digest, "All the members are considered as a single unit or being," had thoroughly penetrated the fabric of Roman law. Churches and boroughs and guilds, even in Anglo-Saxon times, were personified as owners of lands, franchises, and privileges, in a way different from the ownership of the individual persons who were members of the same. Bracton (about 1260), likened a corporation to a flock of sheep, which remains the same flock although

(10) Johns, Babylonian Laws, 208; Simcox, Primitive Civilizations, I, 173, 376.

particular sheep successively depart. By 1311 a borough is called a "*corps,*" a body. In 1349 the courts said, "the corporation is invisible, incorporeal, and cannot be arrested or assaulted;" and in 1461 said, "a corporation aggregate of several is invisible, immortal, and rests only in intendment and consideration of law"—words frequently repeated ever since. By the reign of Edward IV (1461-83) the term "*corporacion*" had come into general use. In the register of names of persons recognized by the private law of Rome, the names of corporations were entered in precisely the same way as those of natural persons. So too, Lord Coke, followed by Lord Hale, and by Blackstone, says: "Persons are of two sorts—natural, created by God, and persons incorporate, created by the policy of man."

As the family grew into the clan, the clan into the tribe, and the tribe into the city, nation, or state, the corporate idea of the family seems to have been applied to the state, particularly in its external and public relations, and every sovereign and independent government or society claimed for itself the attributes of perpetuity and personality. Such an idea early took shape in the Roman law, and, by the end of the Samnite wars (B. C. 282), Rome had become a government of a city over cities throughout Italy. For a long time the property of the city was treated as a public matter, standing outside the domain of private law and commerce; but, during the Empire, it was brought within the range of private law, and the cities began to be treated as persons capable of having *private* as well as public rights and duties. Societies created by the con-

ventions of individuals, but without proprietary capacity, had long existed; these were quick to solicit and secure from the state, as *lawful societies* (collegia licita), proprietary capacity after the example of the cities; and in this way "Roman law contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person, distinguishing from its members the collective whole as the ideal unity of the members bound together by the corporate constitution, in raising the whole to the rank of a person (a juristic person), and in securing it a place in private law as an independent subject of proprietary capacity, standing on the same footing as other private persons" (11). Yet it took nearly a thousand years after the time of Justinian for these same ideas to be appropriated or worked out again by the English law.

§ 7. **Same: The corporate franchise.** The legal ideas involved here are traceable to the doctrines of both the Roman and the feudal law. From the Roman law comes the doctrine that a corporate franchise is a privilege of a public nature conferred by the state; from the feudal law comes the view that this privilege is not merely a *personal* privilege or liberty, such as the right to move about, but a privilege in the nature of a *property* right. We have just seen how the idea of a corporate personality was traced to the public law of Rome—to sustain a juristic personality was originally exclusively the privilege of public corporations and institutions. In the Roman law

(11) Sohm's Institutes of Roman Law, Ledlie's Translation (2d ed.) Ch. II.

"a corporation was an organized body of persons governing themselves." The Romans were jealous of combinations of individuals for any such purpose. The law recognized no general freedom of association; a lawful self-governing society could not be the creation of individuals; many laws were passed from the time of the Twelve Tables (450 B. C.) down to the Empire against illicit companies. Only such societies were lawful as owed their existence to a special public law. Being constituted by public law, they became thereby institutions of the state, partook of its nature, and acquired thereby a corporate personality and proprietary capacity. Julius Caesar and Augustus both dissolved many corporations that had become nurseries of faction and disorder (12). Based therefore upon political instinct as well as upon legal theories, it became a maxim of the Roman law that to usurp the franchise of being a corporation without due authority was unlawful.

Similar ideas early obtained in the English law. In Saxon and early Norman times the nobles exercised the power of conferring corporate privileges within their demesnes. Yet, in the time of Henry II (1154-1189), 18 guilds were fined for being set up without lawful authority. In the time of Bracton (c. 1260) the right to grant franchises and liberties was considered the exclusive prerogative of the king. In 1349 it was held that the right to sue and be sued as a person could be conferred on a guild only by the king, and the absolute necessity of the king's assent to the institution of any corporation was

(12) 2 Kent Comm. 268.

held in 1376 to have been previously settled as clear law, or, as elsewhere stated, by the fourteenth century "the foundation is being laid for a rule which will require a royal license when a new corporation is to be formed" (13). The king, because of political expediency and for financial reasons, had begun to interfere with the creation of voluntary associations and guilds, for they had given trouble in France and might do so in England. "Besides, men will pay for leave to form clubs," and the medieval guild was not content with the purely private status of a club, but aspired "to exercise some jurisdiction and coercive power over its members and perhaps over outsiders." In the time of Henry I (1100-1135), the weavers of London, and in the time of Henry II (1154-1189), the weavers of York, Lincoln, Huntingdon, and Oxford; the fullers of Winchester; the men of Marlborough; and the bakers of London, all pay for the privilege of having their guild.

By the time of Edward I (1272-1307), English boroughs had acquired five characteristics—"the right of perpetual succession, the power to sue and be sued as a whole and by the corporate name, the power to hold lands, the right to use a common seal, and the power of making by-laws" (14); but the theory of their *personality* was not yet entirely worked out. And, when they first appear as ideal persons, they still appear not in the character of mere private persons, but rather as governmental officers. "Their lands, their goods are few, what they

(13) Pollock and Maitland, Hist. Eng. Law (2d ed.), 669.
(14) Maitland, Const. Hist., 54.

own is jurisdiction, governmental powers, and fiscal immunities;'' in other words they were ''the owners of *franchises.''* This is so also with the merchants' guilds; they seemed to be voluntary associations of traders on one hand, and organs of municipal government on the other; they had no property engaged in trade, but their ''property consisted not of lands and goods but of franchises, jurisdictional powers, and fiscal immunities.'' All such franchises or liberties (as they were called in the Great Charter, c. 29) ''covered feudal rights and incidents of too intangible a nature to be appropriately described as '*holdings,*' '' and were treated by the medieval law as *private property* (15). And so, in this capacity of private ownership of franchises, ''we may well suppose that the juristic person made its appearance at a comparatively early time in the guild hall of the brethren.'' By the time of Edward IV (1461-83), it was considered that in the grant of all franchises there is ''a tacit condition annexed to them that an abuse forfeits them.'' In the argument of the great quo warranto case against the city of London in 1692, it was said: ''A corporation is an artificial body, the ligaments of which body are the *franchises* which bind and unite all its members together; and the whole essence and frame of the corporation consist therein,'' or, as expressed by Comyn (c. 1745), followed by Blackstone (1765), ''a corporation is a franchise created by the king.'' This theory was made the

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(15) McKechnie, Magna Carta, 445. Holdsworth, Hist. of Eng. Law, Vol. 1, 63.

basis of Mr. Justice Washington's opinion in the Dartmouth College case in 1819 (16).

§ 8. **History of corporations: In Europe.** As already seen, both public and private or trading corporations existed under the Roman law; under the convenient cloak of the latter, patricians were enabled to engage in remunerative trade and business, from which they were otherwise excluded by public sentiment. After the fall of Rome, most of the commercial corporations disappeared, and only those connected with the church survived. A little later, guilds of workmen and traders began to be formed, which gradually took on the corporate form, growing in strength and power until "in merchant guild, and church guild, and craft guild lay the life of Englishmen who were doing more than knight or baron" to preserve or bring safely across ages of tyranny or win back the right of self government, free speech, and equal justice at the hands of one's equals. Lord Coke claimed to have seen "a charter made by Henry I (1100-1135) by which he granted them gildam mercatorum, and a confirmation by Henry II (1154-1189) by which charters they were incorporated." The Brotherhood of St. Thomas a Becket was authorized in Burgundy before 1250, and a century later transferred to England, confirmed by Edward III and Henry VII who changed its name to the Merchant Adventurers of London, under whose monopoly, in the time of Elizabeth, it had gathered five-sixths of the foreign trade of England into the port of London and into the hands of two hundred share-

(16) 4 Wheat. 518, 657.

holders. Other guilds and brotherhoods were formed early also; the "Weavers Company" goes back to Henry II, if not to Henry I; the Goldsmiths date from 1327; Mercers, 1373; Haberdashers, 1407; Fishmongers, 1433; Vintners, 1437; Merchant Tailors, 1466.

The Italian states were engaged in extensive commerce in the time of Charlemagne, and about 1150 organized a Chamber of Loans which grew into the Bank of Venice by 1171, and became the model of later institutions and of the custom of paying by cheques. The Company of St. George—the Bank of Genoa—dating about 1402, consolidated the public loan into one capital stock to be managed by eight directors annually elected by the stockholders and creditors. The discovery of America made the world larger and soon led to the formation of great companies for exploring and exploiting it. The Russian company dates from 1566; the Eastland, 1579; the Turkey, 1581; the famous East India Company dates from 1600; the Plymouth Company, known as the Merchant Adventurers, that colonized New England, was chartered in 1606, with a capital stock of £7000, and the Hudson Bay Company, still operating in the Canadian northwest, in 1670. When the East India Company was formed, each member traded on his individual stock, taking such shares in each voyage as he chose, according to the rule laid down by the company, but in 1612 the stock was converted into a joint stock—the aggregate subscriptions of the members—to be managed by the governor and directors. The Bank of England was incorporated in 1694.

§ 9. **Same: In America.** During colonial days it is

said there were but six business corporations of American origin: the New York Company "for settling a fishery in these parts," chartered in 1675 by Governor Andros, under his patent of 1664, with a capital stock divided into shares of £10 each; the Free Society of Traders in Pennsylvania chartered in 1682 by William Penn, with a capital stock of £5400, subscribers for fifty pounds to have one vote, one hundred pounds two votes, three hundred pounds or over three votes; the New London Society for Trade and Commerce, dating from 1732; the Union Wharf Company in New Haven, 1760; the Philadelphia Contributership for Insuring Houses from Loss by Fire, 1768; and the Proprietors of the Boston Pier, 1772. Before the formation of the United States Constitution there seems to have been only 21 business corporations formed in the United States. The Constitution put commerce and vested rights on a solid footing, and, before 1800, 200 more corporate charters had been granted. Before 1830, the improvident increase of corporations was looked upon as an evil. In 1822 President Monroe vetoed extensive projects of national internal improvements; the states took up the matter and disastrously failed; then the era of private corporations began about 1840 under liberal general incorporation laws. Prior to 1870 there were few corporate combinations. Railroad consolidation began about 1869, and before 1870 scarcely any system was over 1000 miles; by 1890, 5000 mile systems existed; by 1900, 10,000 mile systems, and now Mr. Harriman dies in control of 70,000 miles of railroad—one-third of all in the country. Before 1870 industrial combina-

tions were small, two trusts having been formed with capital of $13,000,000; but by 1904 it was stated 445 trusts existed, formed out of 8664 original companies, with a capitalization of over $20,000,000,000—the United States Steel Corporation alone having $1,100,000,000 in stock and nearly $400,000,000 in bonds.

Section 2. The Corporation as a Person.

§ 10. **When a corporation is considered as a person. Rights and duties.** For most purposes it is so considered, and especially: (1) As having rights of property and reputation protected at common law, and under constitutional provisions, very much as natural persons. (2) As having duties, arising both from its charter provisions and fixed upon it by the common law. Illustrations: Where the state grants to a university corporation all the property that hereafter escheats to the state, it cannot repeal the law so as to divest the university of its title to all property that has escheated to the state before the repealing law takes effect. To do so would violate the provision of the Bill of Rights, taken from Magna Charta, that "no freeman shall be disseized of his freehold, or his liberty, but by the law of the land" (17). D falsely, orally, and publicly accused C, a coal company, during the coal famine of 1902-3, of charging exhorbitant prices for coal and refusing to sell at all to those who were sick and suffering. No special damage was alleged. Such a charge violates the company's right to its business reputation, and is actionable slander without showing special

(17) Trustees of University v. Foy, 1 Murphy (N. C.) 58.

damage (18). Where the state constitution provides that individuals shall be taxed on their property, after deducting the amount of unpaid mortgages upon it, but also provides for taxing the property of railroad companies without such reduction, such provision violates the Fourteenth Amendment to the Federal Constitution that "no state shall deny to any person within its jurisdiction the equal protection of the laws" (19). Where a railroad is authorized to build a bridge across a navigable river, the state may compel it by mandamus to construct it so as not to obstruct navigation and to remove such obstructions as have been erected. Where a canal company is bound by its charter to construct its canal deep enough to accommodate rafts of a specified size, and negligently fails to keep its canals in proper condition therefor, the company is liable in damages to one whose raft of the proper size is grounded and later destroyed by a storm—the charter having placed this duty on the company for the benefit of persons wishing to use the canal, upon payment of the proper toll (20).

§ 11. **Same: Statutory construction.** (3) Statutes, conferring rights or placing obligations upon persons, generally include corporations, though not specially named. Corporations, however, are not *citizens* entitled to all the privileges of citizens of the several states under the United States Constitution; but they are *citizens* within the clause giving the United States jurisdiction in

(18) Gross Coal Co. v. Rose, 126 Wis. 24.

(19) The Railroad Tax Cases, 13 Fed. R. 722.

(20) Riddle v. Proprietors, 7 Mass. 169.

suits between citizens of different states. For example, where a judge was required to order an election to determine whether a court house should be removed, "upon applications of persons paying one-third of the taxes on real property in the county;" one-third of the taxes were $3333; of this individual owners paid $1300 and corporate owners the balance; it was held the judge was justified in ordering the election, as corporations were persons within the meaning of the law (21). So statutes allowing persons to appeal, or take notes, or their property to be attached or taxed, or forbidding persons from banking or taking usury, apply to corporations. So a corporation is a living person within the meaning of the statute allowing the party to testify when the adverse party is a living person. On the other hand, where the statute defines homicide as the killing of one human being by another, and manslaughter in the second degree as a killing due to the culpable negligence of any person, etc., a corporation cannot be indicted for manslaughter, since 'another' means another human being (22). And where the statute says "any number of persons may incorporate," persons here does not include corporations, for it is contrary to the policy of the law to allow one corporation to be formed from others. So too the constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself," does not protect a corporation from the production of its books before the grand jury on the charge against a corporation for violating the

(21) Crafford v. Supervisors, 87 Va. 110.
(22) People v. Rochester Ry. Co., 195 N. Y. 102.

anti-trust act (23). Neither is a corporation of one state entitled to all the privileges and immunities of citizens of the several states, and so another state may exclude it from doing business altogether within that state (unless the business is interstate commerce), or make various discriminations against it, such as charging a higher license fee than is charged to its own corporations, or allowing a preference to domestic corporations. But if C company is incorporated in state A, with X, Y, and Z, as members, all living in state B, C can sue X, or Y, or Z, or be sued by them in the Federal courts, which have jurisdiction of suits when the parties are citizens of different states; for the corporation is presumed to be a citizen of the state where it is incorporated, without regard to the citizenship of its members.

§ 12. **Same: Ownership of property.** (4) In the ownership of its property, a corporation is considered as a *person*, it owns *its property*, and its members do not own its property. If the property is to be conveyed or recovered, it must be done in the corporate name, and not in that of the members. Suits must be brought by and against it in the corporate name. For example: Where the statute provided that "no vessel should be registered which shall not wholly belong to her Majesty's subjects," a vessel owned by an English corporation is entitled to registry, although a large part or all of its members were Frenchmen (24). So where A conveyed land to B and covenanted that he would not convey any of his remain-

(23) Hale v. Henkel, 201 U. S. 43.
(24) Queen v. Arnaud, 25 L. J. R. 50.

ing land to any person of color, he did not violate this covenant by conveying his land to a corporation composed entirely of colored persons (25). P, having acquired all the stock of C company, brought a suit to replevy from D property formerly belonging to C. Held, P could not maintain such a suit, for the property belonged to a corporation and not to the sole shareholder (26).

Section 3. The Corporation as a Collection of Individuals.

§ 13. **When a corporation is considered as a collection of persons:** (1) In the management, the majority controls. (2) When justice requires, the corporate personality will be ignored, and the rights and duties of the members composing it be considered. This appears usually: (a) In matters relating to changing the constitution. (b) In determining the rights of members among themselves in equity. (c) When corporate sins result from the concerted but apparently individual acts of members. (d) When the corporate organization is used as a cloak to aid in the commission of fraud. As an old case says, "where an act is to be done by a corporation all of the members ought to be assembled together to consent, but this cannot be separately and apart by them at several times." Again where C sued D on a note given for a subscription to stock in C company, which was organized to engage in life insurance, and later the company's charter was amended, authorizing it to engage in fire in-

(25) People's Pleasure Park Co. v. Rohleder, 61 S. E. 794 (Va.).
(26) Button v. Hoffman, 61 Wis. 20.

surance also, to which D did not consent, D was held not liable (27), for this is an organic change that requires unanimous consent, unless otherwise provided in forming the corporation. Where the corporation, through its directors, after a shareholder makes a proper demand, refuses to resist the payment of a tax levied against it under an invalid law, a shareholder may sue in equity to enjoin payment, for such payment is a breach of trust toward the individual shareholder. So too, where A and B, doing business as a partnership, which is in debt, transfer all their partnership property to a corporation, the shares of which they cause to be issued to their wives without payment, and without making any provision to pay the debt, the court will ignore the corporate existence so far as may be necessary to have the property applied to pay the debts of the partnership. And again, where all the members of several corporations together agree to transfer their shares to trustees, who are to issue trust certificates in return to the shareholders, for the purpose of vesting the management of all the corporations in the same hands in order to prevent competition among the corporations, the court will treat the acts of the shareholders as equivalent to formal acts of the corporations themselves, and will dissolve the combining corporations for becoming members of the trust. So too, when one corporation is organized by the officers and stockholders of another corporation, making their interests identical, the court may treat them as identical, if justice so requires; and generally the notion of the *legal entity* will

(27) Ashton v. Burbank, 2 Dillon (U. S.) 485.

not be permitted "to defeat public convenience, justify wrong, protect fraud, or defend crime" (28).

SECTION 4. THE CORPORATION AS A FRANCHISE.

§ 14. **When a corporation is considered as a franchise.** It is considered as a primary franchise mainly in its relation to the state, and particularly: (1) In the methods by which the state retains control over it—by the writs of scire facias or quo warranto. (2) In its incapacity to alienate its franchise, without the consent of the state. These two are based on the doctrine that the franchise to be a corporation is granted upon the implied condition that the grantees will faithfully carry out the purposes for which it was formed. (3) In the power of the state to tax corporations, the franchise may be considered property. (4) In the state's incapacity to change the charter without the consent of the members. (5) In the limit on the power of the majority to change the constitution of the corporation without the consent of all the members. These last three are based on the doctrine that a franchise, once granted and accepted, is a vested estate or interest in the members, of which they cannot be deprived without their consent.

From the earliest times, as Lord Holt said, "a corporation may be forfeited, if the trust be broken, and the end for which it is instituted be perverted;" the state does this by a direct proceeding in court to call the corporation to account for "misuser, abuser or non-user." It was very early ruled that "royal franchises never pass

(28) United States v. Milwaukee Refrig. Co., 142 Fed. R. 247; In re Rieger, etc., 157 Fed. R. 609.

by assignment, without special words in the king's grant," and that A could not inherit a right to hold a market from his father, to whom King John had granted the right, unless the grant itself so provided. Such a rule still obtains as to primary franchises, and often as to others also. Where C company made an assignment of all its property and effects of every kind to A for the benefit of its creditors, A petitioned to be allowed to sell the "franchise to be a corporation," as part of the property assigned, but the court ruled that this primary franchise really belonged to the members and could not be assigned unless expressly provided in the grant (29). So the franchise—the right to be a corporation—may be taxed by the state, as where the constitution provided for taxing all property at its actual value, including "moneys, credits, stocks, franchises, and all other things capable of private ownership"—the right to be a corporate bank is a franchise, and is capable of private ownership, and may be taxed to the corporation itself, upon a valuation equal to the difference between the assessed value of its tangible property and the market value of its outstanding shares (30). While the franchise is intangible, the ownership of it is a vested interest in the corporation and the shareholders, analogous to the ownership of interests in land under the same grant—neither the grantor, nor the grantees can change it without the consent of all.

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(29) Fietsam v. Hay, 122 Ill. 293.

(30) Bank of California v. San Francisco, 142 Cal. 276.

SECTION 5. CORPORATIONS AND OTHER INSTITUTIONS.

§ 15. **Corporation and partnership.** These differ: (1) In origin: the idea of corporations is traceable to the public law of Rome, as above pointed out, while the partnership notion is traceable to the customs of merchants in England and on the Continent and back to Roman traders. (2) In creation: corporations can be created only by express authority of the state; partnerships, by mere contract of parties. (3) In franchise: a corporation has at least one franchise, a partnership none. (4) In management: a corporation is managed only through its duly appointed officers and agents; in partnerships, each partner or member can act for the partnership. (5) In powers: the corporation can lawfully exercise no powers except those expressly conferred or necessarily implied from those granted; these cannot be enlarged except by the state's consent; the members of a partnership may do anything lawful that they agree to. (6) In duration: the corporation is perpetual unless expressly limited; the death, resignation, or insolvency of members does not dissolve; but either of these dissolves a partnership. (7) In ownership of property: the title to the corporate property is in the corporation; that of the partnership in the members of the partnership—they are all considered part owners. (8) In litigation: a corporation sues or is sued in its corporate name; the partnership, in the names of its members. (9) In transfer of interest: the transfer of his interest by a member has no effect on corporate existence; but a transfer of interest dissolves a partnership. (10) In liability of members: in absence of

statute, a member of a corporation is not liable beyond the amount to be paid for his shares; but in partnership, there is an individual liability to the extent of its debts. (11) In dissolution: a corporation can be rightly dissolved only by or with the consent of the state; partners may dissolve a partnership at any time. (12) In theory of existence: a corporation is a legal entity; a partnership is not so considered in English law, except in a few cases, though business men treat it so.

From the foregoing it will be seen that there are many advantages in the corporate organization: continuous succession, indefinite duration, limited liability, unlimited division of transferable shares of capital that can be used as collateral security, with a uniform and uninterrupted management, if found efficient, which readily secures large capital from numerous contributors. On the other hand, however, there may be less opportunity to scrutinize carefully the management, than in the case of a partnership; the chances of double taxation are greater; the corporation can be excluded from doing business where partners may claim the right to engage in such business as *citizens*; and the corporate powers are limited by the charter, which can be changed only by consent of the state.

§ 16. Corporations and joint stock companies. A joint stock company is sometimes said to be a "partnership, with many of the powers of a corporation." It is an evolution of partnership law; some of the incidents of partnership, such as non-transferability of shares, or authority of a partner to bind all the others, is excluded by the contract or statute under which it is formed. While

it can be formed, as between the members themselves or the members and those who deal with it with full knowledge, merely by contract, such formation without express authority does not exclude the partnership liability to those who have no knowledge of the facts. All presumptions are in favor of the partnership liability, and it can be excluded only by express statutory provision or actual knowledge of the party. They are usually authorized by statute, with transferable shares, and managed by a board of directors.

The presumptions of corporation law are exactly the reverse—there is no individual liability here unless expressly created by statute. For example: A, the owner of a patent, executed an instrument of trust declaring himself trustee for various persons to be known as the McKay Machine Association, which should exist for thirty years, with 50,000 shares to be distributed among the members in proportion to their interest, evidenced by certificates transferable on the books of the trustee; such transfer or the death of the owner was not to dissolve the association; no member was to have any authority to contract for the association, but all the business was to be carried on by an executive committee, chosen by the shareholders; profits were to be divided by this committee from time to time, and paid to shareholders in proportion to their interests. There was no statute expressly providing for the formation of such an association. A, as trustee, was taxed upon all the tangible real and personal property of the association, and the state sought to tax the association on the aggregate value of the

shares, less the assessed value of the real and personal property, as corporations were taxed upon their franchises. Held, it could not be so taxed, as it had no franchise, and was only a partnership formed under the common law (31). So too, where a statute authorized the formation of a "partnership association," with transferable shares, managed by a board of managers, with power to take and hold property, sue and be sued in its association name, and use a seal, and such an association was formed in Pennsylvania and did business in Massachusetts—it could not be sued in its association name in Massachusetts, as a corporation could. It must be sued as a partnership, in the names of its members (32).

§ 17. **Corporation and fraternity or stock exchange.** An unincorporated society resembles a partnership more nearly than a corporation; it is not a legal entity, and hence those who claim to be agents of such an institution bind only themselves and those who authorize them to act. The members are not authorized to act for one another as in partnerships.

§ 18. **Corporations and cost-book mining companies.** By custom of miners, there has grown up an unincorporated association that is quite like a joint stock company, in which the shares are transferable without affecting the continued existence of the association; only those especially appointed have authority to bind others. Otherwise partnership rules apply.

§ 19. **Syndicates.** These are in fact temporary part-

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(31) Gleason v. McKay, 134 Mass. 419.

(32) Edwards v. Warren Linoline, etc. Works, 168 Mass. 564.

nerships organized for a particular transaction, such as to purchase or subscribe for a large amount of stock in a corporation to be formed, so as to insure the completion of the proposed scheme. As soon as the special transaction is completed, the syndicate is terminated. They are substantially partnerships (33).

§ 20. **Corporations and state institutions.** There are in many states, state universities, asylums, penitentiaries, etc., managed by boards created by law, and appointed by the governor or elected by electors. These are frequently called corporations of a public kind; while in other states they are not so considered, although they have some corporate powers. They are, in such states, called state institutions, and are subject to modification at the state's will without violation of the constitutional prohibition against impairing the obligation of contracts (34).

SECTION 6. TESTS OF CORPORATE EXISTENCE.

§ 21. **Tests of corporate existence.** Many times it is difficult to tell whether a particular institution is a corporation or not. The following tests have been suggested: (1) The *merger of the individuals* composing the corporate body into one distinct artificial individual existence. (2) The *legislative intent*—if this can be clearly ascertained it will be controlling in the creating state but not necessarily elsewhere. (3) The *powers conferred*—as to have perpetual succession under a special name, and in an artificial form; to take and grant property;

(33) 5 National Corp. Rep. 455; 8 Q. J. Econ. 98.
(34) Thomas v. Board of Trustees, 198 U. S. 207.

contract, sue, and be sued in this name; and to receive other grants and privileges. (4) In foreign jurisdictions, the powers conferred, rather than the legislative declaration will control. For example: The constitution of state A provided that the assent of two-thirds of the members of each branch of the legislature should be requisite to every bill creating any body politic or corporate. A statute provided that any number of persons may associate to establish a banking business, upon filing a certificate giving name, place, amount of stock, number of shares, names of shareholders, and duration of association. Such persons were authorized to do a banking business, exercise such powers as were incidental thereto, choose a president and other officers; president and cashier were to sign contracts, notes, etc. Suits were to be brought by or against the association in the name of the president, but not to abate by his death; conveyances were to be made to or by the president; shares were to be personal property, transferable on the books of the association, the vendee acquiring all the rights and liabilities of the vendor, and no shareholder was to be personally liable for the debts of the association. The act did not receive a two-thirds vote. A bank was organized, and P, as president sued D to recover on demands due the bank. While it was held in the lower court that the powers conferred by the foregoing statute were sufficient to make the banking institutions corporations, and hence invalid under the constitution, this view was reversed in the higher court, and these institutions were held not to be corporations within the meaning of the constitutional

provision, since there was not a complete merger of the members into the artificial being, inasmuch as it could not sue or be sued or hold lands in its association name (35). Again the statute provided for taxing "all moneyed or stock corporations" on their capital stock. The National Express Company was organized as a joint stock company in 1853, under a law of 1849, and materially differed from a corporation; afterward by various enactments such powers were conferred upon such express companies as to make them appear to be corporations, yet in all these acts they were still designated joint stock companies, instead of corporations. It was held that the legislature did not intend to make them into corporations and so they could not be taxed as such. So too, while an insurance company organized in England, as a joint stock company, under a law expressly providing that it was not a corporation, could be treated as a corporation in Massachusetts for purposes of taxation, or a New York express company, organized as a joint stock company under the laws above referred to, could be sued in New Jersey as a corporation, yet such an association would not be considered as a citizen of the state in which it was organized, so as to give the Federal courts jurisdiction, because of diversity of citizenship, when it was sued by a citizen of another state (36).

Section 7. Classes of Corporations.

§ **22. Classes of corporations.** The basis of classification may be: (1) As to number of members: Aggre-

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(35) Warner v. Beers, 23 Wend. (N. Y.) 103.
(36) Great Southern Hotel Co. v. Jones, 177 U. S. 449.

gate and sole. An aggregate corporation is one in which there is capacity to have more than one member at a time. In a sole corporation, there is capacity to have only one member at a time. (2) As to purpose: They are ecclesiastical (or religious), and lay; which latter are eleemosynary and civil. An ecclesiastical corporation was one composed of spiritual persons clothed with a spiritual jurisdiction and subject to control by the church authorities. They do not exist in this country, for the state cannot confer ecclesiastical jurisdiction, as it has none. Religious corporations are, with us, corporations of a civil kind, formed to manage the temporalities of a church. All other than ecclesiastical were lay corporations, organized for various secular purposes; they were divided into eleemosynary, formed to distribute the alms or bounty of their founder; and civil, which were for any other lay purpose. (3) As to completeness of corporate existence: Corporations are said to be pure and perfect, those that have all the powers of self management incident to corporations at common law; and quasi or imperfect, having only part of the powers incident to corporations at common law. A municipal corporation is an illustration of the first, and a county or township, of the latter. (4) As to their relation to the state: Corporations are (a) public, formed for a governmental purpose; as a municipal corporation; (b) quasi-public, one that is really a private corporation, but charged with the performance of some specially public function, like a railroad company; (c) private, those formed for the private benefit of the members themselves, as a manufacturing

company. (5) As to method of acquiring membership: Corporations are non-stock, in which membership is acquired by election or complying with the corporate constitution or by-laws; and stock-corporations, wherein membership is acquired by the complete ownership of shares. (6) As to validity of corporate existence: Corporations are: (a) de jure, one whose right to exercise corporate powers is invulnerable, if assailed by the state in quo warranto proceedings; (b) de facto, one whose existence is ordinarily invulnerable against any one but the state, in a direct quo warranto proceeding; (c) by estoppel, one which has no legal existence except as against someone who is estopped from raising the question.

CHAPTER II.

CREATION OF CORPORATIONS.

§ 23. **In general.** A corporation is created through the joint act of the state and individuals, usually designated *incorporators* or *promoters;* these apply to the state for the privilege of becoming incorporated themselves, or of creating a corporation out of other individuals, or a group or association of other individuals or corporations. After permission is given, these promoters organize or provide for the organization of the corporation; their functions then cease; the members or subscribers contribute the capital, elect directors and officers, and take general control of corporate affairs; the directors and officers then start and keep in operation the ordinary powers of the corporation (1).

SECTION 1. THE STATE'S FUNCTIONS.

§ 24. **State's power to create.** The power to create a corporation is an incident of sovereignty, and so does not have to be conferred by constitutional provision (2). So, too, the sovereign's consent is essential—no other power can rightfully create a corporation. None but the sovereign can create, and none but the sovereign that creates can take away the franchise to be a corporation.

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(1) 1 Cook, Stock and Stockholders (3d ed.), § 2.

(2) McCulloch v. Maryland, 4 Wheat. 316.

§ 25. **Evidences of the sovereign's consent.** These are mainly four: (1) By king's charter; (2) by common law; (3) by prescription; and (4) by legislative act. Lord Coke long ago said the essentials of incorporation are: 1. *Persons* to be incorporated. 2. A *name* by which they are incorporated. 3. Of a certain *place*. 4. *By sufficient words,* and although the words "incorporate," "found," "erect" or "create" are generally used they are not essential; any words indicating an intention to create are sufficient.

§ 26. **By king's charter.** In England, by the common law, this was the usual way; the power still exists in the king, and is sometimes exercised, particularly in creating corporations for establishing colonies. In England the power, however, is now usually exercised through acts of Parliament to which the king's consent is essential. The king, however, cannot create a corporation with power of imprisonment, give it a monopoly, or jurisdiction contrary to the common law. Private business corporations are now organized under the general law called the Companies' Act of 1862, and amendments since; public service companies require a special act of Parliament, and are incorporated only after investigation and report upon their necessity. Several corporations still exist in this country under charters granted by the king before the American Revolution.

§ 27. **Creation by common law.** The state and the nation, in their organized capacity, are corporations; so, also, the king, the bishop, or parson (in the English church), or executive officers generally, in their official

capacity, are considered corporations sole. They are not *incorporated,* in the ordinary sense, but the common law holds these to be corporations, so far as is necessary to enable their functions to be performed without break, in case of death or removal; the office or state endures though the officers die—or, as the common law maxim was, ''the king never dies.'' For example, a school superintendent's bond made to the ''governor of the state,'' can be enforced by any governor, when default occurs, though not the governor when the bond was made, and though there is no statute authorizing such a bond. It is good at common law, and the ''governor'' is a corporation sole, so far as necessary to enforce it (3).

§ 28. **Corporate existence by prescription.** At common law when a corporation could show that it had exercised corporate powers for a long period of time, its right to be a corporation could not be questioned by any one but the state or king; the common law indulged the presumption that the proper charter had once been granted, but, through lapse or accidents of time, had been lost; its right to exist was then said to be by *prescription.* With us, in the case of public corporations, the same presumptions are made; though it has been said that they will not be made in case of private corporations. There seems to be no very good reason for such a statement, since, in the absence of any evidence to the contrary, the presumption of right doing ought to be indulged, and the statutes of limitations relating to quo warranto, should be given effect not only against the state, but its citizens as well.

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(3) Governor v. Allen, 8 Humph. (Tenn.) 176.

§ 29. **Creation by legislative act.** In England, the king, as supreme executive, was the holder of all the franchises of the commonwealth, and hence his consent was essential to the creation of any corporation; with us the legislative bodies are the custodians of the state's franchises, and hence no corporation can be created without legislative consent. Such power inheres in our general legislative bodies, and is exclusive and plenary as to time, place, method, and purpose, unless limited by constitutions, or by the nature of legislative power, or of a franchise. For example, where a bank was created by the legislature without express constitutional provision, it was held the bank was validly created, since the state legislatures can do all things not prohibited by their constitutions (4). So too, Congress can create a corporation to carry out any of the express powers conferred by the Constitution, for such a power is incident to the legislative authority conferred upon Congress within its province (5).

§ 30. **Forms in which the legislative authority is exercised.** These are, when constitutions do not prevent: (1) By *special act*; (2) by *general act*; (3) by *implication;* (4) by *consolidation.* The last two are really only special instances of one or other of the first two.

§ 31. **By special act.** Until about 1840, this was the usual method in the United States, and to a great extent in England; the special act was usually enacted at the suggestion or through the influence (good or bad) of those who wished to become incorporated, and would

(4) Bell v. Bk. of Tenn., Peck (Tenn.) 269.
(5) Luxton v. North River Bridge Co., 153 U. S. 525.

give such powers and qualities as the whim or caprice of the promoters or the legislature dictated; corporations for like purposes had entirely unlike organizations and powers; bribery and corruption were not infrequently resorted to for the purpose of procuring or perpetuating charters; "the time of the legislature was unnecessarily consumed; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature, and the astuteness and diligence of designing and overreaching men, there were constantly coming to light clauses in these acts of the legislature, giving powers and granting privileges which were unjust, inequitable, and which never would have been done with the knowledge of the legislature." In this way Aaron Burr secured a charter for a company to supply the city of New York with water, with authority to use its surplus capital "in any way not inconsistent with the laws and constitutions of the United States and New York," under which the Manhattan Bank has been carrying on its banking business since 1799 (6).

§ 32. **By general act.** It is possible that this method was in use at Rome; the first general law in use in England was in the time of Coke, allowing the erection of hospitals; it was not extended to other corporations. After the political views of the American and French revolutions, that all men were entitled to equal rights, became the motive power of political life, clamor was made for equal privileges in the formation of corporations; to meet this doctrine and to prevent fraud and legislative jobbery

(6) Century Magazine, May, 1899; Parton's Life of Burr, 238.

incident to the grant of franchises by special act, general laws were enacted for the creation of corporations, by complying with easy and simple requirements. As early as 1784, New York, followed by Pennsylvania in 1791, made such a law as to churches; North Carolina in 1795 provided for canal companies in this way; Massachusetts made general regulations for manufacturing corporations in 1809; New York provided for the incorporation of such corporations in 1811; and by 1840 nearly every state had such provision for one, or all, class or classes of corporations. But general acts were not sufficient to overcome the difficulty, for the legislature could and often did create corporations under special acts, though there was a general law under which similar corporations could be formed. It was found necessary to limit the legislature in some way. New York, in her constitution of 1821, provided that the "assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill creating, continuing, altering, or renewing any body politic or corporate." In 1838, Florida, in her constitution, forbade the creation of churches by special act, and required the legislature to pass a general law for their incorporation. In 1845, Louisiana did the same as to all except municipal corporations. In 1846, New York did likewise, and such provisions are now found in most of the state constitutions.

§ 33. **By implication.** Where rights and powers are granted to an association of persons, and there is no mode by which such rights and powers can be enjoyed or exercised, without acting as a corporation, such an associa-

tion is, by *implication,* held to be a corporation to the extent necessary to make such rights and powers available. For example, where the statute provided that the board of directors of a state university shall have the custody of the property of the university, and all lands shall be taken, held, transferred, and managed by said board, and it shall make by-laws, elect members of the faculty, and fix their salaries, such a board is a corporation so far as is necessary to enable it to hold lands and sue and be sued, though the legislature had not declared it to be a corporation (7), yet not to such an extent as to prevent the legislature from modifying it, if it saw fit to do so.

§ 34. **By consolidation.** The legislature, by general law (or special act, where constitutions do not forbid), may provide for the formation of one corporation out of two or more existing corporations. This is designated *consolidation,* or amalgamation. This matter is further considered below.

§ 35. **Limits upon legislative authority.** These are such as arise: (1) From the nature of legislative authority. Since legislatures with us are held to have delegated authority only, it is usually said they cannot re-delegate their discretionary powers to others, and hence cannot delegate to any other body the general power to create corporations; this limitation does not prevent the passing of a general law providing for the creation of corporations by complying with the terms indicated, and directing an executive officer to certify to the fact of compliance. A real exception, however, appears to exist, in

(7) Dunn v. University of Oregon, 9 Ore. 357.

the power of Congress to delegate to the territorial legislatures power to create corporations. (2) From the nature of a franchise. By the common law an individual cannot have even a benefit thrust upon him without his consent, so the state cannot incorporate into a private corporation any person who does not consent to be a member. It follows from this that there must be an acceptance of the act of incorporation by the persons to be incorporated before the act becomes operative. Perhaps the rule is otherwise as to public corporations. (3) From constitutional provisions. These are found in the national or state constitutions, and are considered below.

Illustrations of the first two above are: Where the statute provides that, when the persons interested shall desire to form a corporation, they shall petition the court in writing, setting forth the objects and privileges they desire to exercise, with the name to be used, and the court shall make an order to have the petition entered upon the record, and when this is done the petitioners shall be a corporation with certain powers specified in the act, there is no improper delegation of legislative power (8). Where a majority of landowners petitioned to be incorporated with power to lay out and improve a street, and levy the cost upon the adjoining lands, it was held that a party who had not consented to become a member could not be made such, and have his land sold for refusing to pay his assessment. The legislature has no "power over a person to make him a member of a corporation, and subject

(8) State v. Dawson, 16 Ind. 40.

him to taxation, nolens volens, for the promotion of a private enterprise'' (9).

§ 36. **Powers of Congress.** The national Constitution neither expressly authorizes nor forbids the formation of corporations; but ever since Secretary Hamilton's report upon the national bank, and the decision of McCulloch v. Maryland (10), it is clear that Congress has the incidental power to create any corporation that it deems necessary or convenient in carrying out any of its great substantive powers; it can create a bank, railroad, bridge, turnpike, telegraph, and such like corporations, to be located and operated in any of the states either with or without the state's consent, so far as necessary to provide for interstate commerce (11); it has also exercised the power to create a corporation for building a canal across the Isthmus of Panama; and now owns and operates a railroad across the Isthmus. Such corporations are not entirely foreign in any state, may exercise the power of eminent domain within the state if so authorized for a public purpose, are exempt from state taxation or control if such would impair their efficiency as an instrument of the national government, and have the right to sue and be sued in the Federal courts unless otherwise provided. It is doubtful if the national government can create a corporation to engage generally in manufacturing, mining, or agriculture, within the states, without their consent (12). Within the territories, or in the Dis-

(9) Ellis v. Marshall, 2 Mass. 269.

(10) 4 Wheat. 316.

(11) Luxton v. North River Bridge Co., 153 U. S. 525.

(12) Rep. Am. Bar Assn., 1904, p. 732 ff.; 3 Mich. L. R. 264 (Feb., 1905).

trict of Columbia, Congress has unlimited power to create corporations.

§ 37. **National restrictions on state legislatures.** There are no express limitations, but there is the implied limitation that no state can create corporations for such purposes and confer upon them such powers as would prevent the exercise of such exclusive or concurrent power as Congress has over the same subject. As where a state incorporated a telegraph company with the exclusive right to construct and operate its telegraph lines along a railroad, which, by Federal legislation, was a post road, along which any telegraph company organized under the laws of any state, might, upon obtaining the consent of the railroad company, construct and operate its lines; the exclusive grant of the state must yield to the right of a telegraph company complying with the Federal laws (13).

§ 38. **Powers of territorial legislatures.** The power to create corporations inheres in such bodies, subject to control by Congress; Congress has provided that they can be formed only under general laws, which are subject to repeal or amendment by the territorial legislature or Congress.

§ 39. **State constitutional limitations.** The most usual constitutional limitation is that the legislature shall pass "no special act creating corporations," or "conferring corporate powers," but they "shall provide by general law for the creation of corporations, and all such laws shall be subject to amendment or repeal." By the weight of authority, creating corporations, and conferring cor-

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(13) Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.

porate powers, are equivalent, though some cases hold that after the corporation is once created under general law, other or special powers can be conferred upon it by special act. Such provisions do not prevent the classification of corporations upon some reasonable basis, and the enactment of provisions for the creation of these different classes with different powers and functions for each class. A law which relates to a class of persons or things is *general,* while a law relating to particular persons or things of a class is *special.* Other constitutional provisions sometimes require that no law shall embrace more than one subject, and this shall be distinctly set forth in the title; others require laws for the creation of corporations to receive a two-thirds or three-fourths vote of the members of the legislature.

Where the legislature passed a general law for the incorporation of water works companies, and the next day passed a special act giving E and his associates, as soon as they should incorporate under the general law, the right to supply water to San Francisco, charge certain rates therefor, and have certain rights and be subject to certain burdens, different from those granted or imposed under the general law, such second act violated the constitutional provision that corporations should not be created by special act (13a). So, by special act, to authorize a particular city to take in additional territory, "confers corporate powers," contrary to the constitutional inhibition. But on the other hand, a special act authorizing an existing railroad company to purchase the railroad of another ex-

(13a) San Francisco v. Spring Valley W. W. Co., 48 Cal. 493.

isting company, and, after doing so, to change its own name, does not create a corporation contrary to a provision that corporations shall not be created by special act (14).

SECTION 2. THE PROMOTER'S FUNCTIONS.

§ 40. **Definition and classes.** A promoter is a person, by whatever name, who sets the machinery in motion, procures the subscriptions, directs the end, looks after the organization, prepares the prospectus, and negotiates the agreements, necessary in the formation and creation of a corporation. For convenience we may call promoters (1) statutory, which may be divided into (a) commissioners, under special acts, and (b) incorporators, under general laws; or, (2) self-constituted.

§ 41. **Commissioners.** Under special acts it was usual to designate a part or all of the applicants as *commissioners* to open books, receive subscriptions to stock, distribute the stock, call a meeting for organization, and superintend such meeting; their functions then ceased; such functions were of a public, discretionary character; the commissioners stood toward the corporation and subscribers as trustees. They, however, could subscribe themselves, and exercise their discretion in making allotment of shares if there was an over-subscription (15).

§ 42. **Incorporators.** Under general laws, a certain number of persons are required to sign and file articles of incorporation; they are called *incorporators* or *cor-*

(14) Wallace v. Loomis, 97 U. S. 146.
(15) Walker v. Devereaux, 4 Paige Ch. (N. Y.) 229.

porators, and are usually directed or permitted to call for subscriptions to the stock, call an organization meeting of subscribers, act as inspectors of the first election, certify who are elected, and appoint a time and place of the first directors' meeting; their functions are about the same as the commissioners under special acts; they may or may not, as they choose (at least under some statutes), subscribe for stock. Their functions cease as soon as the organization is complete (16).

§ 43. **Self-constituted promoters.** The law allows others, besides commissioners or incorporators, to take many of the steps preliminary to incorporation; anyone who actively undertakes any necessary step is a promoter; he introduces the enterprise to desirable persons, informs them of its nature, solicits their aid, indicates possible profits and the capital needed, and discharges various other details. In recent years his functions have become important, especially in organizing one corporation out of former existing corporations. The steps he usually takes are: (1) Securing options on the stock or property of the companies to be combined; (2) financing the concern by securing the money necessary to complete the transaction, and furnish working capital; (3) organizing the new company. As soon as options are obtained, a proposition is made to some financial house to *underwrite* the stock (i. e., agree to take it, if the public does not) of the new corporation, to the extent sufficient to furnish all the cash necessary for the transaction, for a commission usually to be paid in stock of the new company. As

(16) Nickum v. Burkhardt, 30 Ore. 464.

soon as such agreement is made, the promoter secures the fewest possible persons necessary to incorporate with the least possible amount of stock, but with authority to increase the stock to the amount required. As soon as this small amount of stock is subscribed, the corporation is organized by the selection of the requisite officers; these then increase the stock to the amount necessary, authorize the issue of all of it to the promoter, who, in consideration therefor, agrees to have conveyances of all the property or stock of the corporations, upon which he holds options, made to the new corporation; by simultaneous transactions, these conveyances, duly executed, are delivered to the corporation, the promoter delivers the stock or cash to the old companies in payment, and delivers, to the financial house, the stock which it was to receive as commissions; if any stock is left the promoter appropriates it as his fee for engineering the deal (17). The legal relations of promoters to the corporation, to shareholders, and among themselves, are discussed elsewhere.

Section 3. The Corporate Charter.

§ 44. **General nature.** The legal conception of a corporation consists in the offer and acceptance of a charter —a written or printed instrument—wherein are set forth the terms and conditions upon which the state, by legislative act, will permit an individual or association of individuals to exercise the franchise or franchises granted therein. It is both a *contract*—resulting from the offer

(17) St. Louis. F. Scott, etc. R. R. Co. v. Tiernan, 37 Kans. 606; Old Dominion Copper Co. v. Bigelow, 188 Mass. 315; Same v. Lewisohn, 210 U. S. 206.

and acceptance, and also a *law* enacted by the legislature, conferring the powers indicated; it is a contract the obligation of which cannot be impaired by either party to it without the consent of the other party (18); it is also a law, such that every person is supposed to know its contents, under the maxim that "ignorance of the law excuses no one" (19). If general, the courts take judicial notice of it; if special, it usually must be pleaded and proved. In its first instance, however, the charter or articles of association is a license of authority for the persons named to convert themselves or other persons, or an association of others, into a corporation by organization, in compliance with the conditions indicated. Although the statute provides that, upon the filing of articles of incorporation, the subscribers thereto "shall thereafter be deemed a body corporate," such does not in fact make a corporation, and it is usually held that no company really exists until the requisite stock has been subscribed, and an organization is completed by naming the directors.

§ 45. **Offer and acceptance.** The offer may be made either by the state to persons (as is the case in general laws), or by persons to the state (as is usual in special acts), and the acceptance be by the other party. Acceptance is essential, but need not be formal; it can be implied from acts, such as organizing and acting under it; to be valid, as against the state which makes the offer (unless the law otherwise expressly provides), the acceptance must be within the state making it, by all to whom the

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(18) Trustees of Dartmouth College v. Woodward, 4 Wheat. 518.

(19) Hoyt v. Thompson, 19 N. Y. 207; Central Transportation Co. v. Pullman Car Co., 139 U. S. 24.

offer was made. Renewals, extensions, and amendments must be accepted in the same way. For example, a special act was passed in January, 1849, authorizing persons named to form a railroad company; November 1, 1851, the new constitution of the state provided that "corporations shall not be created by special act;" June 2, 1852, the grantees met, accepted the special act, and organized. Held, the acceptance was too late, and the corporation was invalid (20). But when it appeared that the same parties had applied for the charter, in the same words in which the state passed the special act in January, 1849, there was an offer to, and acceptance by, the state, and the corporation was valid (21). Where parties, authorized by a law of Maine to form a corporation, met in New York, accepted the charter, and elected directors, who authorized the president, chosen at the same time and place, to execute a mortgage, such mortgage was void, since the corporation had not been lawfully formed. The reason was that natural persons in themselves have no power to form a corporation; the charter or law alone confers such a faculty; this law is inoperative outside of the state enacting it; and the corporate faculty cannot, therefore, accompany the natural persons outside of the state, and be exercised there (22). This severely technical view is now modified by the rule that the corporation, incorporators, and officers who participated in such acts outside of the state are estopped to deny their validity.

(20) State v. Dawson, 16 Ind. 40.
(21) State v. Dawson, 22 Ind. 272.
(22) Miller v. Ewer, 27 Me. 509.

§ 46. **What makes up the charter.** Under a charter from the king, or by a special act of the legislature, the instrument or act itself makes up the charter, and usually sets forth in detail the name, powers, method of acquiring membership, management, etc. Under general laws *articles of incorporation* or association are required to be entered into and filed with some public officer; the charter then consists of (1) the provisions of the *general law,* and (2) the *articles of incorporation,* consistent with the general law. Where the general corporation statute was silent as to the power of a railroad corporation formed under it to lease its road, a power to lease, placed in the articles of incorporation, would not give such power, since it was inconsistent with the general law, on the ground that an enumeration of powers excludes those not enumerated (23).

§ 47. **Provisions of general law.** These enumerate the purpose or purposes for which corporations can be formed; contain provisions or restrictions as to the number of incorporators, name, duration, amount of stock or debt, location of offices, number and qualification of directors and officers, liability of members, method of voting, notice of meetings, quorum, etc. Also they contain certain provisions as to what the articles of incorporation shall contain, and how they shall be executed.

§ 48. **Articles of incorporation.** The general law usually requires that those who wish to incorporate (not less than a certain number of natural persons competent to contract), shall enter into written articles of incorpora-

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(23) Oregon R. R. Co. v. Oregonian Ry. Co., 130 U. S. 1.

tion, sign, and acknowledge the same (as they would a deed), and file the same with some public officer, who is to record the same (if found to comply with the law), and furnish a certified copy thereof under the seal of the state to the applicants; this copy so authenticated usually is made *prima facie* evidence of the existence of the corporation. The general law usually requires these articles to set forth the name of the corporation, its purpose, location, duration, amount of stock, number of shares, officers, directors, and, in some cases, other matters. They must conform to the general laws (inconsistent provisions are surplusage and void), and usually cannot, even though claimed, secure any powers except such as are expressly allowed by the general law; in New Jersey and Delaware, however, any powers may be *created* by the incorporators, if claimed in their articles of association, and not expressly forbidden by the general law. Under the first general incorporation law in England for the formation of hospitals, the corporation was created by a *deed of settlement,* setting forth the organization in the deed endowing the charity. This is not usual in this country. Under the English Companies Acts, a memorandum of association, similar to our articles of incorporation, is to be entered into and filed with a registrar, who issues a certificate stating the corporation has been formed. In England, after the *memorandum* is executed, the parties may adopt *articles of association,* which correspond to the *by-laws* adopted by the members after the articles of incorporation are executed in the United States.

§ 49. **Where to incorporate.** In the absence of express statutory requirements, incorporators do not need to reside in the state in which they seek to be incorporated. So also, under the rules of comity that obtain throughout the United States, a corporation formed under the laws of one state is permitted to do business in another state. In some of the states the incorporation laws are much more liberal than in others, and confer much more extensive powers. In fact, many states have so liberalized their corporation laws as to be fairly open to the charge of bidding for the fees arising from incorporation. Business men generally prefer to incorporate where they can secure the broadest powers, be hampered least, and be required to give as little information to the public as possible. It has therefore become customary to inquire "where is the best place to incorporate for certain purposes?" The so-called liberal or desirable states, for one reason or another, are genrally stated to be: Arizona, Connecticut, Delaware, District of Columbia, Maine, Massachusetts, Nevada, New Jersey, New York, Porto Rico, South Dakota, and West Virginia.

The points to which attention and comparison are usually directed are: Whether part or all of the incorporators or directors must be residents of the incorporating state; whether there is a maximum or minimum limit to the capital stock, and a limit to corporate indebtedness; what part of the stock is required to be subscribed, or paid in, before doing business; whether stock can be paid for in property or services, and, if so, whether, in the absence of actual fraud, the judgment of the directors

as to the value of the property taken in payment of stock is conclusive, or only prima facie sufficient, or whether the matter is for the court or jury to determine; whether the shares may be issued with preferences or not; whether the shareholders' or directors' meetings must be held within the incorporating state; whether the shareholders are authorized to vote by proxy, or to cumulate their votes; whether there is any statutory liability upon shareholders or directors for debts of the corporation, or for failure to make certain reports; whether directors are liable for paying dividends out of the capital, or whether shareholders are liable for receiving such dividends, not knowing they have been so paid out of capital; whether a transfer of unpaid shares releases the transferror; whether the records, minute-, account-, and stock-books must be kept within the state, and be open to inspection of shareholders or public officers; whether annual reports as to names of officers, directors, shareholders, and details as to paid up capital, debts, and operations are required; whether the corporate property, surplus, and franchise are subject to tax, and if so how; whether shares are taxed to the shareholders also, and whether they are subject to an inheritance tax; what are the powers as to consolidation, leasing and selling property, and holding its own shares or shares in other corporations; can material amendments be made without unanimous consent; can directors prefer themselves as creditors; are directors liable only for gross negligence, or must they exercise the reasonable care of competent business men in the management and control of the corporate business; what

are the organization and filing fees; are the provisions of the law under which it is proposed to incorporate plain and clear, and have the courts passed upon their meaning (24).

It will be readily seen that the foregoing questions and others like them require the careful attention, comparison and advice of a competent attorney before any definite conclusion can be reached. Sometimes it is considered desirable to incorporate in a foreign rather than the domestic state, or the reverse, so that suits may or may not be brought or removed to the Federal courts.

SECTION 4. THE ASSOCIATION AGREEMENT.

§ 50. **Its necessity and nature.** Since a corporation aggregate is composed of more than one person, the organization of which is not thrust upon any one, some association of a contractual character necessarily precedes, accompanies, or results from, the formation of a corporation; it need not be, though it usually is, a formal or written transaction, and sometimes it is very complex and intricate. Its general nature, however, is an agreement by each associate with his fellows to organize for the purpose contemplated, and to contribute his proportion of the funds agreed, the consideration being the mutual promises of the parties.

§ 51. **Forms of association contracts.** These are various, but may be classed as: (1) An exclusively statutory contract; or, (2) a common law agreement. These latter

(24) See Machem, Modern Law of Corporations, 2 Vols. 1908; Corporation Manual with Forms 1907-8; Frost, Incorporation (3d ed.) 1908; Clephane, Business Corporations.

are: (a) An agreement to subscribe for stock in the corporation to be formed; (b) an agreement subscribing for stock in a corporation to be formed, or after it is formed; (c) subscriptions to promoters, agents, or trustees; (d) underwriting contracts; (e) application, allotment and notice; (f) conditional subscriptions.

§ 52. **Statutory contract.** In some states where the statutes provide that articles of incorporation shall be filed, in which shall be stated the names of the incorporators, and the number of shares which each agrees to take, all who wish to become members must subscribe for the stock in the articles of incorporation, and no other method of subscribing will be valid. This view, however, seems to be confined to a few cases in New York and Missouri, under special statutes; the general rule in other states is otherwise. For example, where the statute provided that any number of persons not less than five might incorporate by making and subscribing articles of association, "by signing his name and place of residence, and the number of shares he agrees to take," and A, on a preliminary subscription paper, "agreed to take the number of shares written opposite our names"—$5500—but did not sign the articles of incorporation, and died before the articles of incorporation were executed and filed, such subscription could not be enforced against the estate of A, the court saying "the statute neither contemplates nor alludes to any preliminary paper of subscription," and one can become a member in no other mode than the one pointed out in the statute (25).

(25) Sedalia, W. & S. Ry. v. Wilkerson, 83 Mo. 235. Compare: Shelby Co. Ry. v. Crow, 119 S. W. 435 (Mo. App.).

§ 53. **An agreement to subscribe for stock** in a corporation to be formed in the future, contemplates a subscription upon the books of the company after they are properly opened; the person does not by such an agreement, become a member, nor can the corporation enforce the subscription. Where T signed a paper agreeing "to subscribe the sum set against our names, when the books may be opened for subscription"—$3000—and T refused to subscribe when the books were opened and he was notified, T could not be held as a member and be liable for the whole amount of the stock, but only for such damages as the corporation could show it had suffered by T failing to subscribe as agreed (26). Some authors claim there is no difference between an agreement *to subscribe,* and an *agreement subscribing*; i. e., a present subscription, particularly when the corporation is not yet formed (27). The courts, however, take a different view (28).

§ 54. **Agreements subscribing for stock** in a corporation to be formed have occasioned much conflict as to their legal effect, and at least four theories exist: (1) That it is a mere offer, withdrawable at any time before the corporation is organized and accepts the offer; death or insanity revokes it, and any one may withdraw upon giving notice to the person who took the subscription (29). (2) That it is an offer, until acted upon in accordance

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(26) Thrasher v. Pike Co. R. Co., 25 Ill. 393.

(27) Prof. Collins, Rules given in 1 Cook, Corporations (5th ed.), § 75.

(28) Yonkers Gazette Co. v. Taylor, 30 N. Y. App. Div. 334.

(29) Bryant's Pond Co. v. Felt, 87 Me. 234.

with the provisions, and then becomes a binding contract. (3) That it is a binding contract from the time it is made (30). (4) That it is an offer to the proposed corporation before its incorporation and acceptance, but a binding agreement between the subscribers from the time it is made (31). The first view probably has the weight of authority. If the subscription is made to the stock of the corporation already formed, which accepts the subscription, the contract is binding from the time of acceptance. Illustrations of the foregoing views are as follows: F signed for 20 shares on a paper reading "we hereby agree to pay for the number of shares set opposite our names, etc." This was signed by several others, all before the company was incorporated; and, before incorporation, F notified the person who had taken his subscription that he wished to withdraw, and asked that his name be taken off the list. Held, he could so withdraw (note 29, above). So too, where H, along with others, signed "we hereby subscribe for and agree to purchase the shares set opposite our names," under seal, he could withdraw before incorporation by notifying the person who took his subscription. So, where a party signed a similar paper, but not the articles of incorporation, and waited until after incorporation to withdraw, it was too late. On the other hand, where a party signed a preliminary paper of the same kind before incorporation, and died before incorporation, his estate was held liable on the subscription, on the theory that such an agreement

(30) Tonica & Petersburg R. R. v. McNeely, 21 Ill. 71.
(31) Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110.

was valid between the various parties when made, and was a continuing contract with them in their corporate name as soon as formed (note 30, above). So also, where D subscribed a preliminary paper, but with the oral agreement that the subscription should not be delivered until other parties named had subscribed, but which was in fact used to secure other subscriptions, he was liable, although the parties named never subscribed, and D did not know the paper had been so used, or delivered to and acted upon by the corporation. Under these last two theories withdrawal requires the unanimous consent of the subscribers.

§ 55. **Subscription to promoter or trustee.** If made to a statutory promoter, as a commissioner or incorporator, it is a binding contract from the time of making; if made to a self-constituted trustee, who is to organize the corporation, deliver the subscription list to the corporation, and deliver certificates of stock to the subscribers, it is a binding contract between the promoter and subscribers, in accordance with its terms, from the time it is made; he has a right to enforce it, if he performs his part (31a); and when it is delivered to the corporation and accepted by it, the corporation can enforce it (32).

§ 56. **Underwriting.** This is a form of subscription entered into before subscriptions are called for from the public, whereby, for an agreed commission or profit, the underwriters undertake to take all the shares, except what the public subscribes for after the books are regu-

(31a) San Joaquin Land Co. v. West, 94 Cal. 399.
(32) West v. Crawford, 80 Cal. 19.

larly opened and subscriptions called for (33). If properly drawn it is an enforceable contract from the time it is made.

§ 57. **Application, allotment, and notice.** Under the English law an application for shares is made to the promoters, very similar to our subscriptions to stock in a corporation to be formed; after the subscription books are closed, the promoters make allotment among those who have subscribed, either pro rata, or in such way as the promoters deem for the best interests of the corporation. After allotment is made, the subscriber must be notified of the number of shares alloted to him; the contract is not complete until then; before that time it is a mere withdrawable offer.

§ 58. **Conditional subscriptions.** Subscriptions may be upon conditions: (1) Express or implied; (2) precedent or subsequent; (3) before or after incorporation; (4) or the delivery of the subscription may be conditional.

§ 59. **Express and implied conditions.** Express conditions may be found either in the subscription, or in the statutes relating to subscription; the former may be of infinite variety, if not inconsistent with the charter; the most usual condition found in statutes is that payment of a certain amount shall be made at the time the subscription is made; if such subscription is made before incorporation, two views are taken as to the necessity of payment under such a statute—one that it is necessary, and failure to pay makes the subscription void; the other (supported by the weight of authority) is that such pro-

(33) Electric Welding Co. v. Prince, 195 Mass. 242.

vision is meant for the benefit of the corporation only, and it may waive it if it chooses. The principal implied condition, attaching to subscription at common law, is that no one can be called on to pay anything to the corporation for carrying on its business until the whole amount of stock agreed upon is fully subscribed.

§ 60. **Conditional subscriptions prior to incorporation.** If these are necessary for purposes of organization, two views are held: the New York view, that they are entirely void, and cannot be counted; and the Pennsylvania view, which holds the condition to be void, and the subscription absolute, unconditional and valid, so it may be counted as one of the necessary subscriptions. If such conditional subscriptions are not necessary for organization, in either state they would probably be held valid according to their terms.

§ 61. **Conditions precedent and subsequent.** A subscription upon condition precedent is one which requires the condition to be performed, unless waived, before the subscriber can become a member; if made after incorporation two theories exist as to their legal effect: (1) That they are mere withdrawable offers until the condition is fully performed; (2) that they are binding contracts from the time of making, to await the time of performance, and the subscriber cannot withdraw unless the corporation fails to perform. Subscriptions upon conditions subsequent are valid, and have the effect of making the subscriber a member from time of acceptance by the corporation; if the corporation fails to perform the condition, the subscriber cannot withdraw, but has an action for dam-

ages against the corporation for its failure. Courts construe conditional subscriptions to be conditions subsequent if possible (34).

§ 62. **Conditional delivery of subscriptions.** Subscriptions, absolute in form, may be delivered to someone to be delivered to the corporation only upon the happening of some event; if the delivery is made to some one unconnected with the corporation it does not become effective until delivery to, and acceptance by, the corporation; if delivered to an agent of the corporation, one line of authorities holds that the legal effect is the same as if delivered to an outside party, while another line holds that it becomes an absolute delivery to the corporation at once, and the condition is waived.

§ 63. **Fraud and mistake.** These vitiate the subscription the same as in other contracts, and make it voidable at the option of the subscriber. He must, however, be diligent in discovering the fraud or mistake and prompt in repudiating the subscription after ascertaining the fact. The English and some American cases hold that, even if the subscriber has acted with due diligence, he cannot repudiate the subscription after insolvency and creditors' rights have intervened (34a); others hold he can if he is not guilty of laches (35).

§ 64. **Parties that may subscribe.** The general rule is that subscribers must be persons capable of contracting, so far as all subscriptions necessary for organization are concerned. An infant may subscribe, but if he does he

(34) Railroad Co. v. Parks, 86 Tenn. 554.

(34a) Oakes v. Turquand, L. R. 4 App. Cas. 615, 2 H. L. 325.

(35) Hinkley v. Oil Co., 132 Ia. 396.

may repudiate the subscription as in other contracts; at common law, the subscription of a married woman was said to be void, but under statutes in most states her subscription is now valid; an alien friend or non-resident, or person of any nationality or vocation may subscribe; neither private nor public corporations can subscribe for shares unless specially authorized; in the absence of constitutional provisions forbidding, the state or nation, by legislative permission, may subscribe for stock in public service corporations, but not private manufacturing companies. The statutes now often permit one corporation to acquire by original subscription or purchase the shares of other corporations.

Section 5. Organization.

§ 65. **Schemes of organization.** As before indicated, under a king's charter, or a special act, or a deed of settlement, the organization was distinctly set forth in the instrument itself, and usually the persons who were to act as the first officers were designated; methods of continuing the succession were also specifically provided. Under general incorporation laws, it is usual for the organization to be completed, before the articles of incorporation are filed, by electing the proper officers and agents, and certificate of this fact is made when the articles are filed with the public officer; in other cases the incorporators call for subscriptions, and, after these have been received, the incorporators call the subscribers together and they elect officers, adopt by-laws, etc., and start the machinery running. In other states more formal proceedings are essential, such as having a hearing be-

fore a court or commission established for the purpose, with a finding of such court or commission entered upon a public record, and sometimes publications thereof made.

§ 66. **Proof of organization.** Usually under general laws a certified copy of the articles of association, filed with the secretary of state and duly certified by him under the great seal of the state, is prima facie evidence of the existence of the corporation; it is, however, usually not conclusive, and the facts of organization may be inquired into. Under special acts, the act itself, or an exemplified copy thereof with evidence of user, was sufficient to establish corporate existence (36). General reputation has been held to be sufficient.

§ 67. **Commencement of corporate existence.** As to the exact time of corporate birth, there are divergent views, based more or less upon the peculiar provisions of the statutes. These are: (1) There is no corporate life until organization is complete; (2) corporate life begins as soon as the articles are filed with the proper officer, without stock subscription or organization; (3) only a qualified corporate existence begins when the articles are filed, and the adult or perfect corporate capacity is not acquired until the stock is provided as required; (4) corporate life begins as soon as the articles are filed, but, until the stock is divided into shares, the incorporators are tenants in common of the proposed capital; (5) under special acts, the statute may make those named, ipso facto and eo instanti, a corporation without further act on their part. Thus, where the statute required the names of the

(36) Mokelumne Hill, etc. Co. v. Woodbury, 14 Cal. 424.

directors for the first year to be stated in the articles of association, and provided that the "existence of the corporation should date from the filing of the articles with the secretary of state," and this was done, yet it was held that it was not in existence before the stock was subscribed, and a full and complete organization perfected, and those who incurred obligations in the name of the corporation were personally liable (37). On similar facts it was ruled otherwise in South Dakota (38). In another case on like facts it was held that those who participated in incurring the obligation, or were careless in permitting it to be incurred before organization was complete, were personally liable, since a "corporation" without organization was like "the hull of a ship, without rudder or masts or gearings" (39).

§ 68. **Conditions of de jure existence.** A substantial (but not necessarily literal) compliance with all mandatory conditions of the general law is essential to de jure existence, that is, such as will avail against the direct assault of the state. The implied condition that there must be good faith in seeking corporate powers is mandatory; mandatory express conditions are: (1) that there shall be a certain number of incorporators; (2) written articles of agreement; (3) giving the names and residences of subscribers to stock if that is required; (4) naming place of business; (5) stating definitely the purpose or purposes; (6) subscribing articles of association; (7) acknowledging them; (8) filing them as required by law;

(37) Walton v. Oliver, 49 Kans. 107.
(38) Singer Mfg. Co. v. Peck, 9 So. Dak. 29.
(39) Wechselberg v. Flour City Bank, 64 Fed. 90.

all these have been held to be matters of which the state may complain if not substantially followed. Some conditions however are merely directory, as where the statute provided that the first meeting of the incorporators should be called by a majority of the persons named in the act of incorporation, the meeting was called by only one of the incorporators, and all were notified and attended the meeting, the corporation was validly formed (40). So some conditions are *subsequent,* as where the statute provided that before a corporation could *commence business,* the president shall cause the articles of association to be published, and a certificate thereof to be deposited with the secretary of state, and a duplicate with the clerk of the court, the making and depositing of the certificate was not a condition precedent to corporate existence, but a condition to the lawful carrying on of business after incorporation (41).

§ 69. **Conditions of de facto existence.** Something less than a substantial compliance with all mandatory provisions will suffice for de facto existence, i. e., such as is valid as against any one but the state. The following are conditions of de facto existence: (1) A valid law under which such a corporation could be formed; (2) a bona fide attempt to organize under the law; (3) an apparent compliance therewith; and (4) corporate user. When these things concur, by the weight of authority, no one but the state can successfully question the corporate existence, and then only in a direct proceeding for

(40) Newcomb v. Reed, 12 Allen (Mass.), 362.

(41) Harrod v. Hamer, 32 Wis. 162.

that purpose. The matter however is very much involved, and the courts do not seem to follow any settled doctrine. Much of the confusion arises from the great variety of opinion that exists as to the necessity of pleading and proving corporate existence, and the presumptions relating thereto. These are noted elsewhere.

§ 70. **Conditions of existence by estoppel.** Estoppel is founded in the obligation which every man is under to speak and act according to the truth of the case; so, wherever an act is done by a party which cannot be contravened or contradicted without fraud or misconduct on his part, and such act has induced another to believe in the existence of a fact or condition and thereby to change his position, the party who did the act is not permitted to show the contrary. It does not shut out the truth, but rather lets in the whole truth. If persons, therefore, have acted as if a corporation were in existence, in such a way as to recognize it to be such, where it is equitable (42) to hold them to such recognition and inequitable (43) not to do so, they will be estopped to deny such corporate existence, even though it is really neither a de jure nor a de facto corporation. This seems to be the rule by the weight of authority, but there are many cases to the contrary; a different view is that there can be no estoppel upon a matter of law, and hence if there is no law, or an unconstitutional law, there can be no estoppel; still another view is that there can be no estoppel unless there is at least de facto existence; still another view is that

(42) Doyle v. Mizner, etc., 42 Mich. 332.

(43) Estey Manufacturing Co. v. Runnels, 55 Mich. 130.

it is against public policy to allow persons to claim corporate existence unless they have substantially complied with a valid law, hence there can be no recognition of corporate existence arising merely by estoppel, even against the pretended corporation itself (44).

§ 71. **Parties estopped.** Where existence by estoppel is recognized, the parties estopped to deny corporate existence are: (1) The pretended corporation itself; (2) those who act as, or claim to be, members, either among themselves, or in regard to their liability upon their subscription, or statutory liability to corporate creditors (45); (3) the promoters and officers of the apparent corporation; (4) persons who have dealt with the apparent corporation in such a way as to recognize it to be such, either when they seek to avoid their liability to it, or to hold its members liable as partners (46); but dealers with such pretended corporation, without knowledge that it claims to be such, are not estopped to deny it is a corporation; (5) persons who have injured such corporations by their torts or crimes, when called to account, are also estopped.

§ 72. **Effect of failure to comply with conditions.** (1) The state may complain for failure substantially to comply with any mandatory conditions in quo warranto proceedings and prevent further action as a corporation. (2) If there is neither de jure nor de facto existence, a

(44) Boyce v. Trustees of M. E. Church, 46 Md. 359.

(45) Canfield v. Gregory, 66 Conn. 9; McCarthy v. Lavasche, 89 Ill. 270.

(46) West Winsted Sav. Bk. v. Ford, 27 Conn. 282; Snider's Sons' Co. v. Troy, 91 Ala. 224.

person not estopped for other reasons can question the validity of the pretended corporate existence in any proceeding in which it is of any importance to him to have it determined. (3) If there is de facto existence (except as against the state), the powers, rights, duties, and liabilities of the corporation and its members are the same as if de jure. (4) And where there is neither a de jure nor a de facto corporation, as to a party otherwise estopped by his own acts, the corporation is to him the same as it would be if it were de jure. (5) But to one not so estopped, by one line of authority he may treat the members (if it is for a business purpose) as if they were partners (47), and by another hold them as members of an unincorporated association (48)—the liability resting only upon those who have participated in the acts, or authorized them to be done, or ratified them.

(47) Martin v. Fewell, 79 Mo. 401.
(48) Fay v. Noble, 7 Cush. (Mass.) 188.

CHAPTER III.

THE BODY CORPORATE.

SECTION 1. MEMBERS, INTEGRAL PARTS, AND ORGANS OF ACTION.

§ 73. **Necessity of members.** In a corporation aggregate there must be members, otherwise it cannot exist. If it is a non-stock company, the death of all the members terminates the existence; but, if it is a stock company, the representatives of deceased members who succeed to the shares become members, and consequently the corporation is not dissolved. A practice has lately grown up whereby a corporation purchases and retires its own shares of stock. When that is done, if all shares are so retired, it would seem the corporation would be dissolved. No case, however, has yet been decided so holding. The ownership of all the shares by one member does not dissolve the corporation (1), although it has been said that, for some purposes, the corporate existence is suspended until other persons become members by becoming owners of some of the shares, but this is not according to generally received views.

§ 74. **Acquisition of membership.** Membership in non-stock companies is obtained by complying with the con-

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(1) Louisville v. McAteer (Ky.), 81 S. W. 698.

ditions set forth in the constitution and by-laws. In stock corporations, membership is acquired through ownership of stock and this may be: (1) subscription to the stock accepted by the corporation; or, (2) by a completed transfer of shares; or, (3) in some cases, by estoppel such as acting or holding one's self out as a member without in fact having subscribed. We have already considered acquisition of membership by subscription. Transfer of shares is considered below. Where one held himself out as a member of a corporation and allowed the pretended corporation to incur obligations, the member was estopped to allege the corporation was illegal because the law under which it was formed was unconstitutional (2).

§ 75. **Integral parts.** Sometimes one corporation is composed of two groups of individuals in such a way that the continuance of both is essential to the continued corporate existence; if, therefore, from any cause all of one group should die, and there was no method of supplying their place, the corporation would necessarily be dissolved. It was once contended that directors were such an integral part, but the cases have decided otherwise. It is not usual now to find a corporation created with integral parts, although St. Mary's church in Philadelphia is said to be so created.

§ 76. **Organs of action.** Since a corporation is an artificial entity, it can act only through representatives. These are: (1) The majority of a quorum of corporate members duly assembled in corporate meeting; (2) a majority of directors duly assembled in directors' meet-

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(2) McCarthy v. Lavasche, 89 Ill. 270.

ing; (3) officers of the corporation who are considered parts of the organization; (4) agents, who are not considered parts of the organization but who represent it as any agent does his principal; and (5) servants, who do not represent it but simply work for it. For example, where a minister, without a formal meeting of the church trustees so directing, solicited subscriptions on Sunday to complete the church, the names and amounts being written down by a clerk as they were announced, a subscriber could withdraw at any time before the trustees met and accepted the subscription list, or ratified the act of the minister, since he was not duly authorized before that time (3).

§ 77. **Qualifications of agents and officers.** Unless statute or charter prevents, a corporation may select any persons it pleases to be its officers, agents, or servants. It is usual either by statute, charter, or by-law provision, to require directors to be shareholders and in some states they are required to be citizens of the United States.

§ 78. **Functions of shareholders and directors.** Shareholders wield the extraordinary and unusual powers, such as electing directors, accepting and rejecting amendments, increasing and reducing the capital stock, making by-laws, admitting members, and in some circumstances removing officers or restraining ultra vires transactions; disposing of all the corporate property; winding up the corporate business or surrendering the corporate franchises, and dissolving the corporation (4). The directors

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(3) Methodist Church v. Sherman, 36 Wis. 404.

(4) Metropolitan Elevated Ry. Co. v. Manhattan El. Ry. Co., 11 Daly (N. Y.) 373.

control the ordinary business affairs, such as the policy of management; the expediency of acting or contracting; and the selection of inferior officers, fixing their compensation, directing their actions, etc. Within this scope of their authority, if they act in good faith, the stockholders cannot dictate to them nor control their acts in any particular; the stockholders must wait until time for a new election for selecting such directors as will conform to their wishes, unless the power of removal of officers has been reserved to the shareholders by statute, charter, or by-law provisions.

§ 79. **Functions of other officers.** The *president*, merely as president, presides over corporate meetings and has no greater power in managing the corporate business than any other shareholder; but, by statute, or charter, or by-law, or by a course of action acquiesced in by all, he is usually given the power to represent the corporation in most of its ordinary business transactions. He usually executes conveyances, and signs contracts and certificates of stock. The *vice-president* performs the function of the president, when he is unable to perform his duties. The *secretary* keeps the minutes, records of corporate meetings, and has no other duties unless specifically conferred upon him. He is usually made the custodian of the corporate seal, and is required to attest it and affix it to all documents executed by the corporation. He frequently is allowed to issue shares, and is often made the transfer agent of the corporation. The *treasurer* is custodian of the corporate funds, and has power to endorse checks for collection by the corporation.

He is sometimes said to have implied authority to draw checks or bills of exchange, or sign promissory notes for money borrowed by the corporation, but it is doubtful if he can do this without special authority. The corporation can select such other officers and agents and confer such authority upon them, within the corporate powers, as may be necessary or convenient, subject to the general rule that directors should not delegate to others their discretionary powers and duties (5), although some cases hold that this may be done under a general authority "to appoint such subordinate officers and agents as the corporation may require" (6).

Section 2. Internal Relations.

§ 80. Contracts contained in the charter: Dartmouth College case. In 1769 the king of England incorporated twelve persons by the name of Trustees of Dartmouth College, and granted to them and their successors the usual corporate powers, and also authority to fill up any vacancies which might occur in their own body. In 1816, the legislature of New Hampshire attempted to amend the charter by increasing the number of trustees to 21—the nine additional members to be appointed by the governor—and also by putting over the trustees a board of overseers, with power to inspect and control the most important acts of the trustees. The corporation refused to accept the amendment, and brought suit for the conversion of its corporate seal and records by those who took possession under the amendment to the charter; the

(5) First National Bank v. Commercial Assn., 185 N. Y. 575.
(6) Sheridan Light Co. v. Chatham Bank, 127 N. Y. 517.

supreme court of New Hampshire sustained the legislation, but the case was taken to the Supreme Court of the United States, where it was held, reversing the New Hampshire decision, that the charter constituted a contract originally between the king and the corporation, and, after the American Revolution, between New Hampshire and the corporation; and that contract was one the obligation of which could not be impaired by the state of New Hampshire without violating the provision of the national Constitution: "No state shall pass any law impairing the obligation of contracts" (7).

§ 81. **Same: Variety of charter contracts.** From this case, has grown up a great body of corporation law. Resulting from this decision it has been held that in the formation of a corporation there are: (1) A contract between the state and the corporation; (2) a contract between the state and corporate creditors; (3) a contract between stockholders and corporate creditors, in the case of a special statutory liability; (4) a contract between the state and the corporators or members; (5) a contract between the corporation and the members, or among the members themselves, as to the amount to be contributed, or that subscriptions are made in good faith. All these contracts, whether express or implied, are protected by the constitutional provision. For example, where the statute under which the corporation was formed provided that stockholders should be individually liable for corporate debts to double the face value of the shares, this liability could not be taken away, so as to divest a

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(7) Trustees of Dartmouth College v. Woodward, 4 Wheat. 518.

prior creditor of the right to resort to this fund for payment in case the corporation could not pay—there is an implied contract between the state and the existing corporate creditors which cannot be annulled by the state alone (8). So, too, on the other hand, when a person has become a shareholder in a corporation in which there is no individual statutory liability of the shareholders to the creditors, the state cannot, unless the right to amend is reserved, impose such a liablity on the existing shareholders without their consent (9).

§ 82. **Same: Effects of the doctrine.** The Dartmouth College decision has been severely criticised from time to time by writers and judges, but, while reasonably definite limits to it have been worked out by later decisions, "the original doctrines of the case have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself," and have given "solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country." Although for a time, "it was under the protection of this decision that the most enormous and threatening powers in our country have been created," yet, for the most part, under the reservation in state constitutions of the power to repeal or amend corporate charters without let or hindrance, most of the danger threatened has been obviated or averted.

Under this decision all vested property rights acquired by executed contract, as well as all such rights as are

(8) Hawthorne v. Calef, 2 Wall. 10.

(9) Ireland v. Turnpike Co., 19 Oh. S. 369.

necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to the grant, are protected. So too, any valuable privilege, such as an exemption from taxation, or an exclusive right to supply water or gas, or to occupy streets for railway purposes, or that the bills or notes of the grantee shall be received for taxes, given by the corporate charter, and which conduced to the original acceptance of it, is protected by the constitutional provision.

On the other hand, since grants by the state are strictly construed against the grantee, an exclusive grant is never presumed, a tax exemption does not extend to property not used or not necessary, police regulations necessary for the preservation of the public safety, health, and morals are not forbidden, laws authorizing municipal subscriptions, not yet actually made, may be repealed, unnecessary and unexecuted contingent privileges, such as an unexecuted right to consolidate in the future, and subsequent grants not supported by a good consideration, may be revoked without violating this constitutional provision (10). For a full discussion of the doctrine of the Dartmouth College case, see Constitutional Law, §§ 230, 236-42, in Volume XII of this work.

Section 3. Corporate Funds.

§ 83. In general. By incorporation for business purposes there is a *dedication* of certain funds by the implied and express command of the state and the corporators to the attainment of certain purposes in a certain

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(10) Pearsall v. Great Northern Ry. Co., 161 U. S. 646.

way. Because the state believes the purposes desirable, it authorizes the peculiar method; because the corporators deem the method necessary or desirable and the purpose profitable, they contribute the funds; the peculiar method is by the state authorizing a changing body of persons, through a specified form of organization and under a designated name, to act and be considered as one person, in whom are vested the funds, and upon whom is placed the duty of applying them to the purposes named. These funds are designated capital or capital stock.

§ 84. **Capital and capital stock.** There is much confusion in the use of these terms. The best usage, however, is to say the capital of a corporation is the whole amount of its property of whatever kind, and to say that capital stock is the amount which it has obtained or is authorized to obtain by way of subscription (11). The latter is the sum fixed by the corporate charter as the amount paid in or to be paid in by the subscribers for the prosecution of the business and for the benefit of the corporate creditors.

§ 85. **Purpose of capital stock.** Corporations acting through their proper officers, within the scope of corporate powers, fix no liability on their officers or on anyone else than the corporation itself. Hence the purpose and policy of requiring a capital stock as security and indemnity for persons who become its creditors; the law-making power confers upon the members a privilege—a franchise—a right to make contracts in its artificial name without fastening a liability on any natural person; and it

(11) People v. Coleman, 126 N. Y. 433.

exacts from them, as a condition on which it grants this franchise, that they place a capital stock in safe pledge for the security of their creditors. This is a permanent investment, with no power in a shareholder to withdraw it until the corporation is wound up and all its debts paid, and with no power in the managing board to permit it to be withdrawn at the expense of creditors. It is looked upon as a trust fund for the benefit of the corporation and its members, and the protection of corporate creditors. The capital stock "is the aggregate amount of the funds of the corporators, which are combined together under a charter for the attainment of some common object of public convenience or private utility. This amount is usually fixed in the act of incorporation. It is thus limited in reference to the convenience of the intended corporators, and for the information and security of the public at large. To the corporators, it prescribes the amount and subdivisions of their respective contributions to the common fund; the voice which each shall have in its control and management; and the apportionment of the profits of the enterprise. To the community it announces the extent of the means contributed and forming the basis of the dealings of the corporate body, and enables every man to judge of its ability to meet its engagements and perform what it undertakes. The capital stock is like that of a co-partnership or joint stock company, the amount which the partners or associates put in as their stake in the concern. To this they add, upon the credit of the company, from the means and resources of others to such extent as their own prudence

or the confidence of such other persons will permit. Such additions create a debt; they do not form capital, and, if successful in their career, the surplus over and above their capital and debts becomes profit, and is either divided among the partners and associates. or used still further to extend their operations'' (12).

§ 86. **Capital stock, franchise, surplus, and shares of stock.** These are different things. The capital is the money or property, or both, of the corporation; the shareholders' shares are representative of the capital, the surplus, the dividend earning power, the franchises, and the good will. The capital stock of the company is owned and held by the company in its corporate character; the share capital stock of the shareholders, they own and hold in different proportions as individuals; the one belongs to the corporation, the other to the corporators. The *franchise* of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock, while the same franchise does enter into and form part, and a very essential part, of the shareholders' capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The *capital stock* and *surplus* differ also. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. The company may have, in addition, a *surplus,* consisting of some accumulated and re-

(12) Sanford, V. C., in Barry v. Merchants' Exchange, 1 Sand. Ch. (N. Y.) 280.

served fund, or undivided profits, or both, but that surplus is no part of the company's capital stock, and therefore, is not itself capital stock. Neither the capital nor capital stock can be divided and distributed, but the surplus may be, yet that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and franchise in addition. So it may be said that the property of a corporation consists of three things, which are its capital stock, its surplus, its franchise; but these three things, distinct in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents, all three of these in their totality, for it is a business photograph of all the corporate possessions and possibilities (13). Hence, where the statute requires the "capital stock and the surplus" of a corporation to be taxed, the value of such cannot be determined by taking the aggregate market value of the outstanding shares, for such would include the value of the franchise and good will also. There is however much confusion in the taxing laws in the use of the terms "capital," "capital stock," and "property," and the cases cannot be reconciled.

§ **87. Kinds of shares of stock.** Shares are of various kinds, such as common, preferred, guaranteed, interest-bearing, treasury, deferred, founder's shares, watered, fictitious, or spurious.

Common shares entitle their owners to an equal pro-

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(13) Largely quoted from Judge Finch in People v. Coleman, 126 N. Y. 433.

portional participation in the management and profits, during corporate life, and in the net assets in case of dissolution. *Preferred* shares entitle their owners to some preference in the distribution of profits or of assets over the owners of the common stock. They may be either cumulative or non-cumulative as to profits, up to a certain fixed amount; if cumulative, a deficiency in paying the dividend for one year must be made up out of the profits of succeeding years. In the absence of express provision making preferred stock *cumulative* there is a tendency to hold it, nevertheless, to be so, but this is not so strong as to make it entirely certain it will be so held, where it is not really so expressed. Preferred shareholders usually have a right to participate in the management, and are subject to liabilities, as other shareholders. "Six per cent cumulative preferred," means that the owner of such shares will receive six per cent on the face value of his shares before the common shareholders receive anything. In case in any one year there is enough profit to pay only three per cent on the preferred shares, then, in the subsequent years when there are sufficient profits, the preferred shareholder will be entitled not only to the six per cent for those years, but also to all arrears in the payment of the dividends of previous years, before the common shareholders are paid dividends (14). After the preferred shareholders have been paid in full, if there is then a surplus, this may be divided among the common shareholders even though they will thereby re-

(14) Roberts v. Roberts, etc. Co., 184 N. Y. 257; Jermain v. L. S. & M. S. Ry., 91 N. Y. 483.

ceive much more than the six per cent paid to preferred shareholders—unless the preferred shares are made *participating* in the profits, after the common shares receive a dividend equal to the preference dividend. Preferred dividends are not *debts,* like interest, and to be paid at all events, but are to be paid only out of profits (15), when they have been duly declared as dividends by the proper authorities (16). Neither is a preferred shareholder a *creditor* of the company, even though his shares so state, so as to give him claim prior to that of unsecured creditors (17), unless the statute so authorizes (18). *Guaranteed* shares in the United States now mean substantially the same as cumulative preferred shares. *Interest-bearing* shares are such as bear interest upon all sums paid in, until the corporation is completed and profits are earned out of which to pay dividends. Such payment out of capital instead of profits, however, is held to be illegal as against creditors who might be injured thereby.

§ 88. **Same (continued).** *Treasury stock* is often stated to be that part of the authorized stock left in the possession of the corporation to be issued in the future by the corporation or upon further subscription. The term, however, is more properly used to designate stock that has once been issued, but surrendered or forfeited to the corporation, and afterward re-issued or sold by it. It cannot be voted nor does it draw dividends while

(15) Lockhart v. Van Alstyne, 31 Mich. 76.
(16) N. Y., etc. Ry. Co. v. Nickals, 119 U. S. 296.
(17) Hamlin v. Trust Co., 78 Fed. 664.
(18) Heller v. Natl. Bk., 89 Md. 602.

held by the corporation. In recent years, a practice has grown up, particularly in speculative ventures such as involve mining and patent properties, for the owner of the mine or patent to organize a corporation with a certain authorized amount of capital stock, in exchange for all of which the mining property or the patent right is to be conveyed to or accepted by the corporation, in full payment for the whole of the stock, the directors usually passing a resolution that in their judgment the value of the property to the corporation is equal to the value of the stock. The person to whom the stock is so issued then generally is to, and does, donate to the corporation a certain part of the stock received by him as treasury stock fully paid, to enable the corporation to sell it at the best price that can be obtained for it, in order to get the money —"working capital"—actually necessary to start and carry on operations. The buyer of such shares takes as a *purchaser,* and not as an original *subscriber,* and, in the absence of fraud, is not liable to pay any more than the purchase price, even though this is much less than the face value. Such a procedure has been held valid, if there is no fraudulent purpose or over-valuation of the property, and creditors are not thereby injured (19).

Deferred stock draws no dividend until some one class of shares receive their dividends. They are practically common shares. *Debenture-stock* is not stock at all in our American sense, but rather a bond, the holder of which is a creditor and entitled to interest, and it is issued in

(19) Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Iron Co. v. Hays, 165 Pa. St. 489.

such a way that any fraction of it may be transferred. *Founder's shares* entitle the holder to all the profits, after certain fixed maximum dividends are paid to the other shareholders. *Watered stock* is that which upon its face purports to have been paid for at its full value, but which in fact has been issued without the corporation having the right to demand the full face value thereof. *Fictitious shares* are substantially the same as watered shares. *Spurious stock* is that issued in excess of the amount authorized. It is void, and the holder does not become a member of the corporation.

§ 89. **Right to create capital stock.** The power to create, increase, or decrease, capital stock is a franchise which can be exercised only under the authority of a legislative grant (20). At the time a corporation is organized, however, it may provide for both common and preferred stock, and call for subscriptions for either; if the corporation is first created, and the stock subscribed upon the understanding that only common stock shall be issued, by the weight of authority the corporation cannot (except by unanimous consent of shareholders) create shares that shall have a preference over the common shares (21). By express legislative authority, however, it has been held that the majority of members, contrary to the wishes of the minority, may issue preferred shares; it is said to be analogous to borrowing money and the majority certainly have the right to do that, if done in good faith.

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(20) Cook v. Marshall, 191 Pa. St. 315.
(21) Campbell v. Zylonite Co., 121 N. Y. 455.

§ 90. **Nature of shares of stock.** A share of stock is an intangible property right to participate in the profits of the corporation, and, in the event of dissolution, to participate in the division of assets after debts are paid. Such shares are personal property, goods, wares, or merchandise within the seventeenth section of the statute of frauds, and choses in action. They are not negotiable instruments, and at common law could not be taken by attachment, or on execution, or in replevin, because of their incorporeal nature. By statutes in most of the states provision is made for attaching shares of stock or taking them upon execution, by notifying the company not to transfer them otherwise than as directed by the court. They are usually considered as being located at the domicile of their owner, though the state may give them a situs at the domicile of the corporation (22). They are evidenced by a certificate which usually says: "This is to certify that A. B. is the owner of Ten Shares of the Capital Stock of X Company of the par value of $100 each, fully paid up and transferable only upon the books of the corporation upon surrender of this certificate duly endorsed." This is usually signed by the president, and countersigned by the secretary under the seal of the corporation. Upon the back is usually a form of assignment which will read: "For value received, I hereby assign and transfer all my right, title, and interest to the shares in X Company, evidenced by this certificate, to Y, and I do hereby irrevocably appoint Z to be my agent, or attorney in fact, for me, and in my name, to have the trans-

(22) Plimpton v. Bigelow, 93 N. Y. 592.

fer of the same made upon the books of the corporation." This will be signed by A. B. and delivered to Y. It is not necessary to fill in the name of the purchaser, nor the name of the attorney, to make the transfer. These may be left blank and then, after delivery of the certificate to Y, the purchaser, he may, by mere delivery of the certificate, sell it to some one else, and this party to another, and so on; the last purchaser may fill in his own name and the name of any proper person to have the transfer made on the books of the company, who can then take the certificate to the corporation, surrender it, have the transfer made to the purchaser upon the books, and receive a new certificate in the name of such purchaser.

Section 4. Corporate Name.

§ 91. **Necessity of a name.** It was said long ago that names of corporations are given of necessity, for the corporate name is as a baptismal name, and the very being of their constitution, "and though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts." Such is the rule yet.

§ 92. **Acquisition of a name.** A name is usually given in the charter or articles of association, and the law now generally requires it to be so given; and sometimes specific and definite provisions exist which must be carefully followed; but in the absence of specific provisions, it is not perhaps indispensable that it should be so given; it may be derived from usage. The corporation perhaps cannot select a name already in use by another corporation organized in the same state.

§ 93. **Rights in the corporate name.** If lawfully acquired, the right to a corporate name is a franchise (23), and the corporation which has acquired a name has the same right to use it as it would a trade mark, and may enjoin its subsequent appropriation and use by another corporation, association, or person, if it would be damaged thereby (24). It has been held, however, that a foreign corporation cannot prevent the use of a corporate name afterwards selected by a domestic corporation; and no exclusive right can be acquired in geographical names. The secretary of state or the proper registering officer has discretionary power to refuse to register a company that chooses a name that too closely resembles one already in use.

§ 94. **Effect of misnomer.** In the case of contracts this has no effect, if the identity of the corporation can be established. In process against the corporation by the wrong name, a suit is not validly begun, but it may be corrected by amendment; if the corporation issue process for itself in a wrong name, it is ground for plea in abatement; slight variations, not misleading as to the identity of a corporation, are not usually material.

§ 95. **Change of name.** The corporate name can be changed only by consent of the state and of the shareholders; such change, if legal, does not affect the rights, duties, or liabilities of the corporation (25). It has been held, however, if the change is illegal, members consent-

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(23) Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436.

(24) Armington v. Palmer, 21 R. I. 109.

(25) Cincinnati Cooperage Co. v. Bate, 96 Ky. 356. Compare: Neff v. Covington, etc. Co., 108 Ky. 457.

ing thereto are liable as partners afterwards. Statutes usually provide a simple method for changing a corporate name.

Section 5. Corporate Life.

§ 96. **Mode of existence. Perpetual succession.** In the absence of any provision to the contrary the duration of a corporation is perpetual. It is however usual, by constitutional or statutory provisions, to fix a limit to the corporate life. Some statutes require a limit to be fixed in the articles of association. Within the time fixed however the corporation is said to have *perpetual succession,* by which is meant the power to provide other members in the place of those who drop out. In the case of non-stock corporations, this is usually done by the election of other members; in stock corporations, the successor in the ownership of stock becomes a member. For example, the general corporation law provided that "every corporation shall have succession for the period limited in its charter, and, when no period is limited, for twenty years." Afterwards a special act was passed incorporating a gas company with "perpetual succession," with the exclusive right to manufacture gas for thirty years. At the end of twenty years the state brought quo warranto to prevent the corporation from continuing to act as such. Held, corporate life had expired, and that "perpetual succession" meant continuous succession for the twenty years fixed by the general law, and not everlasting existence, or existence for thirty years (26).

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(26) State v. Payne, 129 Mo. 468.

§ 97. **Mode of action. Shareholders' meeting.** So far as the members control corporate action, they must do so in a duly called corporate meeting. This meeting must be called by the proper officers; in the absence of other provisions, the directors have this authority; it is usual to put such authority in the hands of the president or secretary. Regular meetings of shareholders are also usually provided for in the by-laws, the time and place being designated there. Where no corporate meeting was held, and the secretary called on a majority of the shareholders individually, and they separately authorized a mortgage of the corporate property to be given, which was executed by the president and two stockholders at the request of the mortgagee, to whom it was delivered to secure a $3000 note given by the corporation for the loan of that sum of money, it was held that such mortgage was not valid (27).

§ 98. **Notice of shareholders' meeting.** At common law, notice of corporate meetings, definite as to day, hour, and place was necessary to be given personally to each shareholder in order to make the meeting valid, as against a shareholder who had no notice, was not present, and complained promptly; and, in the absence of charter, by-laws, or statutory provisions, this is still the rule; the matter, however, is usually regulated by the charter or by-laws; these frequently allow notice to be given by publication, or through the mail. If the meeting is a special one, or the business to be done extraordinary or unusual, the notice must state what the business to be done is,

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(27) Duke v. Markham, 105 N. C. 131.

but one who is present and participates in the business, without objecting, is estopped to deny the validity of the meeting. No further notice is necessary of an adjourned meeting, or the business to be done thereat, than the record of the resolution adjourning the meeting, if the time and place are fixed by the resolution; otherwise notice should be given. Since regulations concerning meetings are for the benefit of shareholders, they may waive informalities by attendance and participation, or acquiescence in the results.

§ 99. **Quorum.** At common law if all of an indefinite number of stockholders are duly notified to meet, those who assemble constitute a quorum; but charter, by-law, or statutory provisions now usually require a majority of the shares outstanding to constitute a quorum. It has been held that members may vote by proxy, and in such a case it seems that one member, holding the proxy of enough shareholders to make a majority of the shares, may by himself hold a corporate meeting and elect the officers, providing this meeting was duly called. This is frequently done by corporations organized in New Jersey and in other states with liberal corporation laws. And where there is no provision as to what constitutes a quorum, one member, with the proxies of a few others (not however, with his own stock, constituting a majority of shares), can hold a lawful meeting at the time and place fixed in the by-laws of the corporation, without notifying any other shareholders, although the corporation has been defunct for seventeen years; and the directors so elected at such meeting are validly elected, since

due notice is given in the by-laws, and since, at common law, those who attend, one or many, if all are duly notified, constitute a quorum (28).

§ 100. **Place of meeting.** In order to make a valid meeting, against shareholders who do not attend, the meeting must be held within the state creating the corporation (29); but those who attend the meeting held out of the state (30) will be estopped from denying the validity of the action taken. A corporation formed by the consolidation of two corporations, created in different states, may hold a shareholders' meeting in either state (31). So, too, the rule that corporate meetings should be held in the creating state does not apply to non-stock, beneficial organizations. Statutes frequently provide that shareholders' meetings may be held out of the state, if the articles of incorporation so provide.

§ 101. **Directors' meeting.** The directors must also act in a duly called meeting. They have no authority to bind the corporation by their individual acts done outside the corporate meeting (32). The rules as to the notice of meetings are the same as in the case of shareholders. There are cases, however, holding with much reason that a person dealing with a corporation, having no notice to the contrary, has a right to presume that the rules and regulations have been followed by those acting for the company, and, if not, the company is bound anyhow (33).

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(28) Morrill v. Little Falls Mfg. Co., 53 Minn. 371.

(29) Miller v. Ewer, 27 Me. 509.

(30) Missouri Lead, etc. Co. v. Reinhardt, 114 Mo. 218.

(31) Graham v. Boston, etc. Co., 118 U. S. 161.

(32) Bank of L. R. v. McCarthy, 55 Ark. 473.

(33) Louisville, etc. Ry. v. Trust Co., 174 U. S. 552, 573.

In the absence of a provision to the contrary, the quorum of the directors' meeting is a majority of all the directors. They vote as individuals and not according to shares, and cannot vote by proxy. Being agents of the corporation, there is no necessity to meet within the state, as in the case of shareholders. Exercising delegated power themselves, it is usual to say that they cannot, without special authority, delegate their discretionary duties to an executive committee. There are many cases, however, and perhaps the weight of authority, to the contrary (34).

§ 102. **Records of meetings.** Corporate meetings, both of shareholders and directors, being deliberative assemblies, should be conducted according to parliamentary usages. It is not necessary to the validity of corporate actions that records be kept, yet, if they are kept, they are the best evidence of the action taken, and other evidence is not admissible until it is shown that the records cannot be obtained. When no records were kept, or they have been lost or destroyed, oral evidence is admissible to prove corporate actions, and the ordinary presumptions made in other cases apply here.

§ 103. **Execution of contracts.** The contracts of a corporation should be made in the corporate name. Conveyances of land should be to the corporation in its corporate name; so, too, the conveyance by the corporation should purport to be granted and executed by the corporation in its corporate name. So, also, notes by the corporation should be signed by the corporate name, and

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(34) Sheridan, etc. Co. v. Bank, 127 N. Y. 517; Union, etc. Ry. Co. v. Chicago, etc. Ry. Co., 163 U. S. 564.

notes payable to the corporation should be made to it in its corporate name. Yet courts often hold contracts and conveyances, not executed in conformity to the foregoing rules, to be the contracts and conveyances of the corporation, when it is entirely clear they were meant to be such (35). Where a deed read "I, Thomas H. Benton, President of the Sulphur Springs Land Company, do hereby convey, etc." and it was signed by Benton in the same way, it was held that this did not pass the title of the land company to the grantee (36). It should have read "The Sulphur Springs Land Company hereby conveys, etc." and should have been signed "The Sulphur Springs Land Co. by Thomas H. Benton, President." The American Bar Association has recommended a form for corporation acknowledgments that is sufficient in most states. The use of the corporate seal is discussed below.

Section 6. Corporate Death. Dissolution of Corporations.

§ **104. Methods of dissolution.** A corporation may be dissolved: (1) By expiration of the time mentioned in the charter. (2) By the happening of a condition or contingency prescribed by the charter to have that effect. (3) By death of all the members in the case of non-stock corporations; but in the case of a stock corporation the shares of the deceased members are distributed as personal property, and consequently the successor in ownership becomes a member, and the corporate life is not

(35) Rawlings v. Gas Light Co., 105 Tenn. 268.
(36) Zoller v. Ide, 1 Neb. 439.

affected. (4) By the loss of an integral part (in case of corporations consisting of integral parts), without the power to replace such integral part. (5) By a surrender of the franchise, accepted by the state. It is both said and denied that acceptance by the state is essential to the dissolution; this is usually now provided for by a general law prescribing a method whereby this may be done. Mere non-user or insolvency of the corporation does not alone amount to a dissolution (37). (6) By repeal of the corporate charter by the legislature, when the state has reserved such power. (7) By forfeiture of the corporate franchise, by a proceeding in the courts for that purpose, because of non-user or misuser of the franchise granted.

§ 105. **One man companies.** In the case of stock corporations, there is usually nothing to prevent one member from acquiring all the shares of stock. By the weight of authority, if the corporation was validly created, the fact that one person acquires all the stock in good faith has no legal effect upon the continued corporate existence; acting in the corporate name and through the corporate officers, the action taken is corporate action (38). And, on the other hand, the individual acts of the sole owner do not bind the corporation; though the individual owner might himself be estopped to deny that such action was in effect corporate action. In Maryland and Kentucky, it has been held that the ownership of stock by one person virtually suspends corporate existence during such sole

(37) Slee v. Bloom, 19 Johns. (N. Y.) 456.

(38) Durlacher v. Frazer, 8 Wyo. 58; Chase v. Tel. Co., 121 Mich. 631.

ownership. And in equity, or in cases of fraud, or evasion of corporate duties, the acts of all the shareholders or a single shareholder owning all the stock, may be treated as the acts of the corporation if necessary to work out justice (39). As, for instance, where a sole shareholder in a corporation without creditors set fire to the corporate property, there could be no recovery upon the insurance policy (40).

§ 106. **Effect of dissolution** (41). (1) The corporate franchises can no longer be exercised. (2) Involuntary dissolution at common law extinguished executory contracts, and no damages could be recovered for non-performance. In equity and by statute, in most states, the obligation of such contracts survives, and may be enforced against the corporate assets, and it is said that voluntary dissolution does not extinguish such contracts. (3) At common law, debts due to or from the corporation were extinguished; but now such claims are preserved in equity and generally by statute. (4) Personal property at common law, upon dissolution, vested in the crown or state; but now it is preserved as an asset for the payment of creditors, or, after payment of creditors, for distribution among the shareholders (42). (5) Real property, at common law, reverted to the grantor; but now a corporation whose duration is limited may take or grant an estate in fee; and, upon dissolution, all real property

(39) Bundy v. Ophir Iron Co., 38 Oh. St. 300.

(40) Meily v. Insurance Co., 148 Fed. 683.

(41) State Bank v. State, 1 Blackf. (Ind.) 267; In re Higginson [1899], 1 Q. B. 325.

(42) Bacon v. Robertson, 18 How. 480.

then belonging to the corporation becomes assets for the payment of debts and distribution among shareholders, there being no reversion either to the grantor or to the state in the case of private business corporations (43). In eleemosynary and non-business corporations the common law doctrines of the escheating of personal property to the state and reversion of real property to the grantor are applied (44), though this has recently been denied (45). (6) Actions by a corporation at common law abate upon its dissolution, but statutes usually now prevent such a result by allowing the representative of the defunct corporation to continue the suit in its place. At common law no valid judgment could be rendered against a dissolved corporation, and attachment and garnishment proceedings were terminated by a dissolution. Statutes now usually provide that dissolution shall not abate pending suits, nor prevent the bringing of suits within a certain time against the defunct corporation (46). Upon dissolution, either by voluntary surrender of the charter, by repeal, or by forfeiture, statutes usually provide either that the corporation itself shall continue to exist for a certain time, in order to wind up its affairs, or a receiver shall be appointed for such purpose.

In the case of public service corporations which are dissolved, or to be dissolved, a receiver is appointed to take charge of the property and continue its operations for the

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(43) Wilson v. Leary, 120 N. C. 90.

(44) Titcomb v. Mut. Ins. Co., 79 Me. 315: Mormon Church v. U. S., 136 U. S. 1.

(45) Huber v. Martin, 127 Wis. 412.

(46) Shayne v. Post Pub. Co., 168 N. Y. 70.

benefit of the public, until a re-organization can be made by forming a new company to take over the property discharged of its debts. Usually the property is sold, under foreclosure of some mortgage lien, to a committee who purchases for the benefit of the lienholders, who have agreed upon some plan of organizing a new company to carry on the business, the stock and bonds of which will be issued to the former creditors and shareholders, in proportions agreed upon in the re-organization plan.

CHAPTER IV.

CORPORATE POWERS AND LIABILITIES.

SECTION 1. POWERS IN GENERAL.

§ 107. **Theories of corporate capacity.** There are two of these: (1) Special capacities; (2) general capacity. The doctrine of special capacities is that corporations have such powers, and only such, as are expressly granted or necessarily implied from those granted; all others are excluded. The doctrine of general capacity is that a corporation once duly created has all the powers and capacities of a natural person, so far as they can be exercised by an artificial person. While the rule of special capacities is almost universally adhered to in this country, there is a tendency in the decisions of the state courts, where no public interest or policy is specially involved and creditors' rights are not affected, practically to allow a general capacity to do everything in every way that an individual could do within the field covered by a business in which the corporation was organized to engage (1). Where the corporate charter authorized the company "to make contracts and engagements with other corporations or with individuals for the transporting or conveying of freight and passengers," the company

(1) Hemick v. Hardware Co., 73 Neb. 809.

leased its railroad and rolling stock to another company for twenty years at a fixed rental per year, with a power in the lessor to terminate the lease at any time, the damage done thereby to the lessee to be assessed by arbitrators. The lessor terminated the lease. The damages were assessed for the loss of the unexpired term at $150,000, which the lessor refused to pay. Held, the lessor was not liable, as, under the doctrine of special capacities, the company had only such powers as were expressly conferred, and the charter provision above given only referred to traffic contracts for the through transportation of freight and passengers (2). On the other hand, where a corporation was organized "to make, sell, or lend on hire railway carriages and rolling stock, and carry on the business of mechanical engineers and general contractors," under the doctrine of general capacity it could acquire, build, and operate a railroad, since such authority was not forbidden (3). This doctrine, however, is not now followed in England in parliamentary corporations (4).

Section 2. Classes of Corporate Powers.

§ 108. **Corporate powers are of three classes:** (1) Incidental; (2) express; (3) implied. The incidental powers are such as are annexed tacitly, without any express words, to any corporation duly created. They include: (a) The power to have perpetual succession for the period designated in the charter or statute; (b) to have a

(2) Thomas v. Ry. Co., 101 U. S. 71.

(3) Riche v. Ashbury Ry. Co., L. R. 9 Ex. 224.

(4) Same case, reversed in the House of Lords, L. R. 7 H. L. 653.

corporate name and to contract, grant, receive, sue, and be sued therein; (c) to purchase and hold the personal and real property necessary to carry on the business for which it was formed; (d) to have and use a corporate seal; (e) to make by-laws; (f) to remove members and officers under some circumstances.

Express powers are such as are specifically enumerated in the charter or general law, and constitutionally granted therein, together with such as are lawfully inserted in the articles of incorporation. But powers not authorized by the general law cannot be acquired by placing them in the articles of incorporation.

Implied powers are such as are reasonably necessary or proper for the execution of the powers expressly granted, and not expressly or impliedly excluded. In this connection, *necessary* does not mean indispensable but does include that which is convenient and usual in carrying out the express powers. But where a corporation was formed "to manufacture cars, and to purchase, acquire, and hold such real property as may be deemed necessary for the successful prosecution of its business," such corporation had no authority to build a town for its employes, put up 2200 houses for them, construct streets, sewage, sewage farms, gas and water works, erect school houses, churches, hotels, theaters, market-houses, concert and dancing halls, and provide for carrying them on, establish and operate groceries, dry goods and other stores for furnishing their employes with supplies, at a place about 18 miles from Chicago, where land was much cheaper than in Chicago, and where it was desirable to locate their extensive shops,

and where, at the time, there were no dwellings, stores, schools, and places of amusement and subsistence sufficient for the needs and convenience of the large number of employes needed to carry on the business. On the other hand it had implied power to acquire 55 acres of vacant land upon which to dump cinders, and 25 more acres upon which to store cars, also to build larger boilers than were then needed in order to meet future needs, and in the meantime to furnish power to adjoining plants, and under the power to "sell supplies" on its palace cars, it might sell beer, wine, and whiskey, as beverages, but could not hold shares in a steel company, all the product of which was used by the car company in the construction of its cars (5).

§ 109. **Rules for construing corporate charters.** The legislative intention is to be ascertained, if possible, and given full effect; the language is to be construed neither strictly nor liberally, but according to its fair import; words are to be given their ordinary meaning, unless custom or usage has given them a different one; the whole law or charter is to be considered; but the enumeration of certain powers, by implication excludes all other unnecessary powers. When the question is one between the state and the corporation, or when the public interest is involved, a strict construction against the corporation and in favor of the state will be applied, and then, if the charter is silent about a power, it does not exist; if the language is susceptible of two meanings, that construction is to be adopted which works least harm to the state.

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(5) People v. Pullman Car Co., 175 Ill. 125.

The rules of construction of the charters of corporations formed under general laws are the same as those formed under special laws (6), although some courts make an effort to apply a different rule to articles of incorporation under general laws, on the ground that they are private contracts similar to partnership association articles (7).

SECTION 3. PARTICULAR POWERS.

§ 110. **Power to contract.** In general, in order to determine the validity of a corporate contract, three questions must be answered: (1) Did the corporation have power to make it? (2) Was it made by an authorized agent? (3) Was it made in the proper form?

The first is a question of the subject matter; the second, one of the agent's authority; and the third, one of form. The first is considered immediately following; the second belongs in the province of the law of Agency (see Volume I), the general rules of which apply to corporations as principals, as well as to individuals, or, so far as they are peculiar to corporations, are considered herein under the headings of corporate modes of action, directors, officers, etc. The third is further considered herein under the subject of the corporate seal.

§ 111. **Power to contract debts and borrow money.** A corporation may contract debts to any extent for its corporate purposes that its credit will allow, unless statutes forbid (8). Statutes frequently fix the limit as to the

(6) Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1; Dempster, etc. Co. v. Downs, 126 Iowa, 80.

(7) Natl. Bk. v. Inc. Co., 41 Oh. St. 1.

(8) Barry v. Merchants' Ex., 1 Sandf. (N. Y.) 280.

amount that may be borrowed, and in such case one who has knowingly loaned money to the corporation, in excess of the limit, cannot recover the excess as against other creditors, unless the money was used in discharging existing valid debts. But one who, in good faith, loans money after the corporation has already borrowed up to the limit can recover, if he had no knowledge of the fact. It has been held that a corporation cannot borrow money for the purpose of purchasing its own shares, nor for the purpose of purchasing property not needed. Thus a savings company cannot borrow money to make an investment before it has received any deposits to be invested (9). So, too, where a national bank purchases not only the draft with the bill of lading attached, but also the goods represented by the bill, such agreement cannot be enforced against the bank (10).

§ **112. Power to issue negotiable instruments.** Whenever it is a necessary or convenient method of conducting their proper business, corporations, through agents having the express or implied authority so to bind the corporation, have the power to issue any form of negotiable instruments; but they have no power unless expressly authorized to deal in notes or bonds. A stricter rule is applied in England than in the United States. If a corporation has power to issue a promissory note for any purpose, a bona fide holder for value, having no knowledge of want of authority of the agent or of other irregularity or that it was issued for an ultra vires purpose, will be pro-

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(9) Franklin Co. v. Lewiston, etc. Co., 68 Me. 43.

(10) Leonhard & Co. v. Small, 117 Tenn. 153.

tected (11). Where a corporation was formed for encouraging athletic exercises with power to "purchase and erect suitable buildings for its accommodation," it had authority to borrow money to be used in building a clubhouse (12).

§ 113. **Power to issue accommodation paper.** There is no implied power to issue or indorse negotiable instruments for the mere accommodation of an outside party; but, if it is done by a corporation having authority to issue promissory notes, a bona fide purchaser, without knowledge of the fact, will be protected. Thus, where a manufacturing company, having authority to purchase property on credit and give its promissory note therefor, gave its note for the accommodation of X, without receiving any consideration therefor, and the plaintiff acquired it in due course of business before maturity, and paid full value for it, without knowledge that the corporation had received no consideration, he could enforce payment against the corporation (13).

§ 114. **Power to be surety or guarantor.** There is no such implied power. This, and the rule relating to accommodation notes, are based upon the view that neither the officers nor the majority of the shareholders have any right to give away the corporate property to the injury of other shareholders without their consent; nor can the officers or all the shareholders give away the corporate property without making provision for the payment of creditors. But since, where the reason ceases the rule

(11) Monument Natl. Bk. v. Globe Works, 101 Mass. 57.
(12) Bradbury v. Canoe Club, 153 Mass. 77.
(13) Monument Natl. Bk. v. Globe Works, 101 Mass. 57.

ceases also, and persons can give away their property if they choose, it has been held that if all the shareholders agree, and no bona fide creditor's rights are affected, the guaranty will be binding (14). There are also well-defined exceptions to the general rule; e. g., a corporation rightly holding the securities of another person or corporation has a right to dispose of them and guarantee their payment in the ordinary course of business; so also a railway company may guarantee the payment of the bonds and interest of the company whose road it is authorized to lease.

§ 115. **Power to form partnerships.** The general rule is that a corporation has no such power, unless expressly authorized; the reason being that it would necessarily give to some one outside the corporation, i. e., the other partner, a power of management over the corporation, which would be inconsistent with its duty to the state. Of course, the corporation may be expressly authorized to enter into a partnership, and in California it has been held that if the management was left entirely to the corporation it might be a partner. Where a manufacturing corporation entered into a partnership with three other similar corporations for manufacturing cotton-seed oil, and turned its plant over to the partnership for the purpose, it can repudiate the agreement, and upon failure, after demand, to allow the plaintiff to enter into possession of its own property, an action for unlawful detainer may be maintained to recover possession (15).

§ 116. **Trusts and trade combinations.** Etymologically the word trust comes from the same as *tryst, troth* and

(14) Murphy v. Land Co., 97 Fed. 723.
(15) Mallory v. Hanaur Oil Works, 86 Tenn. 598.

true. In law a trust exists whenever the legal title to property is vested in one person, called the trustee, to be held or dealt with by him, for the benefit of another, called the beneficiary. The name of the industrial institutions now designated trusts is derived from the trust of equity. Its present use originated in 1882, when the Standard Oil Trust was formed by the shareholders in several different companies transferring their shares to trustees in trust to accomplish certain business ends, converting the trust of equity into a peculiar form of business association. Since then its meaning has even become much broader, and "embraces every act, agreement, or combination of persons or capital believed to be done, made, or formed with the intent, effect, power or tendency to monopolize business, restrain or interfere with competitive trade, or to fix, influence, or increase the price of commodities." These things are not new, either in the law or in economics.

Forms assumed: A rough classification, based upon the tie that binds them together, gives the following forms: 1. Friendly agreements. 2. Pools. 3. Stock-controlling schemes. 4. Corporations.

§ **117. Power of corporations to form trusts.** In considering this subject, two principles should be kept constantly in mind—*one,* based upon the nature of a corporation, is, that the grant of corporate power is a *franchise* granted by the state for a definite purpose, to be exercised in a way prescribed, and subject to forfeiture by the state if it is not carried out in accordance with the grant; the *second* is based upon public policy, viz., that combination

agreements of individuals, partnerships, or corporations, with the purpose and effect (with certain exceptions) of restraining trade, destroying competition, and resulting in monopoly, are unenforcible, and under some circumstances wrongful—tortious or criminal.

§ 118. **Same: Corporation must not violate its franchise.** The first principle, that a corporation must not abdicate its purpose or prescribed method of management, is well expressed in Whittenton Mills v. Upton (16), by Thomas, J., where the question involved was whether a corporation could be a member of a partnership. He said: "No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If, then, this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property. . . . The partner may manage and conduct the business of the corporation, and bind it by his acts. In doing so he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will." This agreement was held void. Such agreements, if valid, would have the effect, as Judge Finch says, in People v. North River Sugar Ref. Co. (17), to permit a corporation "to receive its powers and priv-

(16) 10 Gray (Mass.) 582.
(17) 121 N. Y. 582.

ileges merely to put them in pawn; and to give away to an irresponsible board (or person) its entire independence and self-control.''

The above were cases of purely private business corporations, not those owing any special duty to the public. The rule applies, of course, with more reason and more strictness to *quasi-public* corporations, or those owing particular duties to the public. As stated by Justice Miller in Thomas v. West Jersey R. Co. (18), ''Where a corporation, like a railroad company, has granted to it by charter a franchise intended, in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy.''

From these principles, therefore, it follows that all contracts of a corporation, either private or quasi-public, to enter into combinations, whether of partnership, pool, restraint of trade, trust, lease, consolidation, sale or otherwise, the necessary effect of which is to destroy its autonomy in the performance of its duty to the state, are, or ought to be, held to be void and unenforcible, and this so, regardless of any other quality of the contract. And it is generally held so, although there are some holdings

(18) 101 U. S. 71.

to the contrary, in the case of leases and sales by purely private corporations.

While a contract by a corporation violating this principle alone is not criminal or wrongful, it is ultra vires in the true sense, and the state undoubtedly has a technical right to complain. The state, however, does not, and will not, complain of such a transaction unless the contract made, or things done under it, injuriously affect or threaten public interests; then the state may interfere by quo warranto to prevent or enjoin its consummation, either by ousting the corporation of the power usurped or annulling the charter.

§ 119. Same: Contracts in restraint of trade are void. The second principle—that contracts in restraint of trade (with certain exceptions) are void and unenforcible—has alone, no peculiar application to corporations, but applies to individuals and partnerships also; this principle together with the first one above, gives the state a power over corporations in regard to such contracts that it does not have over individuals, viz., that the state can actively and of its own accord take the life of the offending corporation for engaging in such a contract, though no punishment, aside from refusing to enforce the contract, could be meted out to an offending individual or partnership.

What contracts restraining trade are void, is a difficult matter, in the present state of the law, to determine. Judge Taft, in the Addyston Pipe case, divides contracts in restraint of trade and competition into three classes:

(a) Those in which the restraining contract is wholly

incidental and ancillary to another main or principal contract that is lawful; (b) those in which the restraining contract is the main or principal contract, to which others are only incidental, ancillary, or preliminary to this purpose; (c) those in which the restraining contract is the only contract made.

As to class (a) it was formerly held, perhaps, that all restraints upon trade were invalid. As Judge Taft says: "The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others. . . . After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced."

And for various reasons "covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller;

and (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary to the enjoyment by the buyer of the property, good-will or interest in the partnership bought; or to the legitimate ends of the existing partnership; or to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business. . . . This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined" (19).

What, however, is reasonable or unreasonable depends upon the circumstances of each case, and different courts take different views of similar circumstances, but total restraints in both space and time are generally held void; yet with improved machinery and communication,

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(19) United States v. Addyston Pipe Co., 85 Fed. 271.

what are now reasonable for protection would formerly have been held to be unreasonable.

Under class (b) when the main contract is to restrain trade, and this does it so unreasonably as to affect public interests, such main and ancillary contracts are not enforcible. Under class (c) there being no lawful purpose to forward, no rule to measure the necessity of restriction, but a purpose to avoid competition which the law favors, such contracts should be held void. Perhaps there should be added to the above classes another that we may call class (d)—public service companies or occupations—in which any restraints that prevent them from the performance of their whole duty to the public are held to be invalid. Whether contracts in undue restraint of trade are anything more than unenforcible, that is, illegal as being tortious or wrongful, so as to be the basis of a suit for damages, or a criminal prosecution, in the absence of any statute regulating the matter, is in controversy; but the weight of authority certainly is that if there is no fraud, coercion, intimidation, or something of the kind practised upon some one, there is no civil or criminal liability.

§ 120. **Anti-trust acts.** Most of the states have enacted anti-trust acts, making a civil and criminal liability for creating or attempting to create a monopoly. Some of these, especially the late Michigan, Missouri and Texas acts, are peculiarly stringent.

The United States act of 1890 (26 Stat. 209) created seven different crimes relating to interstate, foreign, or territorial trade or commerce, punishable by a penalty not exceeding $5,000, or one year's imprisonment, or both,

by providing that every person (including corporations or associations) who shall make (1) a contract in restraint of such trade, or (2) engage in a combination in form of a trust or otherwise, or (3) engage in a conspiracy, in restraint of such trade, or (4) monopolize, or (5) attempt to monopolize, or (6) combine, or (7) conspire, to monopolize such trade, shall be guilty of a misdemeanor punishable as stated; and an injured party may recover damages, and the combination can be enjoined at the suit of United States attorneys.

This applies not to the making or manufacture of goods but allows an injunction against a combination of railway employes to obstruct railroad commerce. It also prevents the formation of pools and traffic combinations among railroads, the direct tendency of which is to limit competition, whether reasonable or unreasonable; also such combinations as directly affect the sale of products that are to cross state lines. While the states have generally enacted these very stringent anti-trust acts, some of the states have with a very strange inconsistency, expressly authorized one corporation to acquire, own and vote shares in other corporations, whether competing or otherwise, and have thereby practically nullified all the supposed benefits of the anti-trust legislation, and legalized in a permanent form exactly what the anti-trust acts were designed to make criminal.

§ 121. **Unincorporated trusts.** With the foregoing principles in mind, it may be helpful to describe some of the forms assumed (as above specified) more particularly. The unincorporated forms are the first three—

friendly agreements, pools, and certain stock-controlling schemes.

§ 122. **Same: Friendly agreements.** The first, *friendly agreements* are numerous, and sometimes the most efficient. The tie that binds, however, is only the personal honor and business interest of the members. This form has been very effective in the Meat Packers' Association, a mutual understanding among some six or eight large corporations, based upon the personal honor of the members, whereby (as alleged) the price of cattle and meat in all the important markets has been controlled for a number of years. It is stated on the authority of one of their number that there is a working agreement to the effect "that they will not, to their own loss and the destruction of their goodwill, send more beef to a market than it reasonably requires. . . . Further than that there is no bond between any two houses as to *output*. It is not an illegal bond, nor is it intended to effect a restriction of trade to the detriment of the people; it is for natural and necessary self-protection. For instance, one of the packing-houses calls us up by telephone and asks, 'Are you sending any extra cars anywhere today?' We reply, let us say, 'Yes; we are sending six to New York, because we learn from the reports of our agents that the market there requires such a shipment.' The packer who called us up does not ship what extra beef he may have to New York, but to some other market. . . . Another day we call him up and ask him a similar question, and similarly abide by his answer, should it be like ours. The answer is not begotten of speculation as to the amount of

beef the market will take; it is based upon fact. We could not afford to send six cars of beef to New York or anywhere else upon the chance of disposing of them. A side of beef is marketable too short a time for that." The supreme court, however, held that this friendly agreement violated the Federal anti-trust act (20).

§ 123. Same: Pools. The second, or *pools,* are agreements between several to divide competitive business or products, either upon basis of work to be done, or earnings from the same, in proportions agreed upon. In all other respects each party retains full control of his property. The method of enforcement is usually by a deposit of money to be forfeited in case the agreement is violated. Pools were, perhaps, invented by the railroads, and between 1858 and 1887 a large part of the competitive railroad business of the country was made more or less noncompetitive by these institutions. In regard to such pools between connecting lines of railroad, where a division of earnings is made for through traffic, if the rates established are not unreasonable, such transactions are valid; if between competing lines and for the purpose of preventing competition they are, at common law, prima facie invalid; however in England and in New Hampshire they have been held valid if the rates agreed upon were not unreasonable. The Interstate Commerce law made them illegal in 1887, and they were formally abandoned, but superseded by various rate-fixing associations. By 1897 the country was practically parceled out into the Joint

(20) Swift v. United States, 196 U. S. 375.

Traffic Association east of the Mississippi, and north of the Ohio and Potomac; the Trans-Missouri Freight Association operating from the Missouri to the Pacific. In the south there were three separate associations which acted in harmony. In 1897-8, the Trans-Missouri and the Joint Traffic Associations were held illegal by the Supreme Court of the United States, as violating the anti-trust law of 1890. The railroads shortly after drew closer together than ever under some of the forms named below.

A good illustration of the pool is the Addyston Pipe case, in which there was an association of six iron pipe manufacturing companies. A representative board was created "to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the same shall have the protection of all the other shops." When a letting was to occur, all were notified by the board as to what material was called for; it then fixed the price, say at $24 per ton for a 2,800 ton job at St. Louis; bids were asked for by this board from the six companies; the one which offered the highest bonus, $6.50 per ton, for the privilege, was awarded the contract. When the public letting at St. Louis occurred this company bid $24 per ton, and since the law required three bidders, two of the other companies bid slightly more than $24. The bonus was divided among the companies in proportion to the capacities of the various mills composing the association.

This pool was held to violate the national anti-trust act of 1890 (21).

§ 124. **Same: Stock-controlling schemes.** The third form is the *stock-controlling* form, or the *original trust* form. This was exclusively used to effect a combination among corporations. It was accomplished by the shareholders of the several corporations to be combined delivering their shares of stock, in trust, to certain persons as trustees, with power to vote the same; in return, the trustees issued trust certificates to the former shareholders. The trust certificate holders had the power to elect the trustees; and the trustees had the power, by holding the stock of the various companies, to elect the directors of each company, and could, in this way, place the management of all the companies in the hands of the same persons. The earnings from all the companies were put together, and from this sum dividends were declared to the *trust certificate* holders; the former shareholders in the constituent companies thereby participated in the profits and losses of the combination, regardless of the financial condition of the company in which they had held stock. The Sugar Refineries Co. is a good illustration. It was organized in 1887, composed of twenty refineries, created "to promote economy, reduce cost so as to keep price as low as is consistent with reasonable profit, to furnish protection against unlawful combinations of labor, to prevent lowering of standard of refined sugar." The properties combined were capitalized at $6,690,000, but the trust capital was fixed at $50,000,000. It was declared

(21) Addyston Pipe & Steel Co. v. U. S., 175 U. S. 271.

illegal in 1890 by the New York courts, because it was a monopoly, and a partnership between corporations (22). It immediately incorporated in New Jersey as the American Sugar Refining Co. and now comes under the next form.

§ 125. **Incorporated trusts: Property owning class.** The fourth is the *corporate* form wherein a corporation becomes the apparent owner, or is organized for the purpose of apparently purchasing and owning, or holding, part or all of the stock or property of the corporations to be combined. These take two general forms: 1. Property absorption. 2. Stock absorption. In the first, the old companies usually go out of existence, leaving one colossal corporation as the owner of the property. In the second, the old companies remain.

Of the *property* owning class, a good illustration is the Glucose Sugar Refining Company (23). This company was organized in New Jersey in 1897, to purchase the property of all kinds, of all the glucose factories within the "corn belt," comprised in an ellipse 950 miles long, and 700 miles wide, of which Peoria, Ill., was the geographical center. Cash or stock was to be issued in payment for the various properties. Each company knew what the purpose was. Options were given to a Chicago bank for a certain period, agreeing to convey all the property to the bank or its transferee, upon request, at a certain date. The American Glucose Co., of New Jersey, with its plant at Peoria, Ill., had given such an option, in-

(22) People v. N. R. Sugar Ref. Co., 121 N. Y. 582.
(23) Harding v. American Glucose Co., 182 Ill. 551.

cluding a promise on its part and those of its officers, not to buy, sell or manufacture glucose or its products, for a certain period, within 1,000 miles of Chicago; other companies did substantially the same; these transactions were conducted with secrecy, and were completed, when a dissenting Illinois shareholder in the American Glucose Co. complained; the conveyance was set aside, and the carrying out of the plan enjoined. Under somewhat similar circumstances in the Sugar trust case (24), and the Trenton Potteries case (25), the transaction was held not to be unlawful in the manner in which the questions were raised.

§ 126. Same: Stock absorption class (community of interest). The *stock absorption* plans are mainly two, according as their ostensible purpose is (1) *managing,* or (2) *holding.* The first of these subdivide into *"community of interest"* plans; *"bond-stock"* exchange methods, or *"stock-stock"* exchange methods. Of these, the "community of interest" plan is very flexible, and does not yet seem to have a well defined meaning. The general idea is that where there are two or more competing corporations, each, or the shareholders of each, acquire by interchange a considerable part of the shares of the others, so that there is a kind of "tenancy in common" of the whole of the competing properties. The legality of such plans has not yet been the subject of litigation on the ground that they, in effect, form unlawful combinations.

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(24) U. S. v. E. C. Knight Co., 156 U. S., 1.

(25) Trenton Potteries Co. v. Oliphant, 58 N. J. Eq., 507.

§ 127. **Same: Stock absorption class (bond-stock exchange).** The *bond-stock* plan is a very simple device for placing the management of one or more companies under the control of another. A Company, having power to issue bonds, offers to B Company to issue its bonds for the shares of B Company; the offer and terms of exchange are made known to the shareholders of B Company, and, if a majority accept, the shares are transferred to A Company, and its bonds issued to such shareholders; the bonds are usually secured by a deposit by A Company of the same shares with a trustee, as collateral security for the payment of the interest on the bonds; A Company, however, retains the right to vote the shares, until default is made in paying interest. Its legality, as a plan of *combination,* has not yet been tested, but the Supreme Court of the United States has said "it is not within the general powers of a corporation to purchase the stock of corporations for the purpose of controlling their management, unless permission be given them to do so" (26).

§ 128. **Same: Stock absorption class (stock-stock exchange).** The *stock-stock* plan is substantially the same as the *bond-stock* plan, except the stock of A Company is exchanged for the stock of B Company. The most conspicuous example of this method is the United States Steel Corporation, formed February 23, 1901, in New Jersey, with an authorized capital stock of $1,100,000,000, and bonds to the amount of $304,000,000 or $1,404,000,000. Its *business* powers, by its charter, included manufacturing,

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(26) De La Vergne Refrig. Co. v. German Ins. Co., 175 U. S., 40.

mining, trading, building, transporting, and obtaining and using patents; its *trust* powers, authorized it to acquire in any way any or all of the stocks, bonds and securities, or property, of companies or persons engaged in any or all of the foregoing lines of business, and hold for investment, or use, sell, or exercise, "all the rights, powers, and privileges of ownership, and to exercise all voting power thereon," and to issue its own stock or obligations, and make any contracts in order to do any of these things. It was a combination of ten of the largest concerns engaged in the iron and steel industry at the time; each of these ten was itself a large aggregation, mostly by stock ownership, of many others ranging in number from six to thirty, several of which were made up of three or four or more sub-companies. The stock and bonds of the ten constituent companies at the time of formation amounted to $911,700,000, for which there were issued altogether $1,167,000,000. The stockholders that formerly composed the ten or more corporations have now been consolidated into shareholders of the United States Steel Corporation, and are no longer shareholders of the constituent companies; practically the sole stockholder of each of the constituent companies is the United States Steel Corporation; as such, it elects the board of directors of each corporation, and can, if it chooses, give exactly the same board to all the companies; upon the other hand, the shareholders of the United States Steel Corporation elect its directors—who, if they wish, may elect themselves directors of each of the constituent companies. The result is the same as if the former companies, or all their share-

holders, had entered into a permanent agreement to combine their competing properties by electing the same persons directors over all the companies, with power to control the management and policy of each according to the terms of the agreement. The business result is precisely the same as that of the original *trust* form. Its legality has not been attacked in the courts.

§ **129. Same: Stock absorption class (holding company).** The holding corporation is, or may be, created in exactly the same way as the *stock-stock* plan just described. The purpose is alleged to be different, to be *investment*, rather than *management*. Its most conspicuous illustration is the Northern Securities Company, formed (as stated) to invest in, and hold as an investment, Great Northern and Northern Pacific railway shares. These railroads are competing lines for something like 1,000 miles, and the laws of the northwestern states forbade the consolidation of parallel and competing lines. The Northern Securities Company was organized in New Jersey in 1900 with $400,000,000 capital stock. It immediately issued enough of its stock at par to acquire, in exchange, more than 90 per cent of Great Northern shares at $180; likewise it issued enough of its stock at par to acquire in exchange a like per cent of Northern Pacific at $115 per share—the Union Pacific getting $80,000,000 in Northern Securities stock, and over $9,000,000 cash, for its $78,000,000 holdings of Northern Pacific; the total issue of new stock was about $122,000,000 more than the par value of the combined capital stock of the two companies. The existence of the Securities company was to be perpetual.

In deciding that the holding of this stock by this company violated the anti-trust act of 1890 the Supreme Court through Mr. Justice Harlan said (27): "The government does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation, engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations, authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate, and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will legally expressed." Also, "although the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations; that combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are embraced by the act; . . . that the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce." The foregoing was said in reference to section 1, of the act,

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(27) Northern Securities Co. v. United States, 193 U. S. 197.

which forbids "every contract, combination, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations."

§ 130. **Same: Same (continued).** The second section reads, "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize" such trade or commerce shall be deemed guilty of a misdemeanor, and on conviction "shall be fined $5,000, or imprisoned one year or both." In regard to this, it seems pertinent to inquire whether, if the wealth of one person was sufficient, and he had the inclination to acquire most of the stock of the competing railroads of the west, in order to prevent competition among them, and attempted to do so—would this action violate section 2? This does not yet seem to be answered by the courts. In Illinois, where corporations may be formed for any lawful purpose, it was held that corporations for purposes of this kind, which resulted in a monopoly of the whiskey business of the country and of the gas business of Chicago, were illegal and void, and could be dissolved by the state, although apparently there was perfect compliance with the provisions of the law (28). New Jersey on the other hand, holds that courts have no authority to declare such a corporation illegal, so long as the state legislature has not expressly made them illegal (29). The Whiskey trust has passed through all possible forms from a *pool* in 1882, to an *ordinary trust* in 1887; a *corporation* trust under Illinois law in 1890, held illegal by

(28) Distilling Co. v. People, 156 Ill. 448; People v. Gas Trust, 130 Ill. 268.

(29) Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507.

the supreme court of Illinois in 1894; a New Jersey *managing corporation* in 1899, formed of four others, after the Illinois decision; and now finally, as formed in 1902, it is a New Jersey Distilleries Securities Corporation, controlling (or trying to) all the rest.

§ **131. Power to consolidate.** Consolidation is a merger, union, or amalgamation, by which the stock of two or more corporations is made one, their property and franchises combined into one, their names merged, and their powers combined, so that practically one new corporation results. Consent of the state and consent of the shareholders are essential to any consolidation. By the weight of authority, under a reserved power to alter or amend the charter, the majority of members may consent to a consolidation against the wishes of the minority; if the state has not reserved the power to amend, unanimous consent of members is essential. By consolidation the old companies are usually dissolved, their property becomes that of the new company, but their liabilities continue against the old companies, although they are usually enforcible against the new company; lands vest by virtue of the consolidation in the new company without further conveyance; and generally contract rights of the old companies pass to the new, and it must perform the contract duties of the old; the new company is liable for the debts of the old companies to the extent of the property received, and, if expressly assumed, to their full extent (30); they are also usually held liable for the torts of the old

(30) Compton v. Ry. Co., 45 Oh. St. 592, 167 U. S. 1. Compare: Wabash, St. L. etc. Ry. Co. v. Ham, 114 U. S. 587.

companies. The foregoing matters are however, usually regulated, either in the agreement of consolidation, or by the provisions of the statute authorizing them. In interstate consolidations, the new company exists in each state with the powers, rights, and franchises that the constituent company in that state had, but not those that belong to the companies created in another state. Thus two companies were incorporated, one in Illinois and one in Missouri, to build a bridge across the Mississippi river at the same place; afterward they were consolidated, by authority of the laws of each state, with a capital stock equal to the sum of the stocks of the separate companies. Held, Illinois could tax the new company on all its capital stock, since it was a separate company in Illinois (31).

§ 132. **Power to acquire and hold real property.** At common law it has been said a corporation had this power to an unlimited extent. But in this country it is generally held that corporations have the right to purchase and hold only such as is necessary or convenient to carry out their legitimate purposes. If a conveyance of real estate to the corporation is executed, none but the state can afterwards complain; and it can only in a quo warranto proceeding to forfeit the corporate charter, unless some statute authorizes the conveyance to be set aside or the land to be escheated to the state (32). If the conveyance is not completed, an interested party may object in any suit by the corporation to perfect its title; and a court of equity will not decree a specific performance of a contract

(31) Quincy Ry. Bridge Co. v. Adams Co., 88 Ill. 615.
(32) Com. v. N. Y. etc. Ry. Co., 132 Pa. St. 591.

to convey land which a corporation has no authority to hold. A corporation may take any estate in land except an estate in joint tenancy, or such as dower, curtesy, or tenancy in tail. A grant of a freehold, without words of inheritance or succession, will pass a fee to a corporation aggregate, even if the corporate life is limited, but, in the case of a corporation sole, the word "successors" should be used to carry a fee. Thus, where land was granted to a railroad company, and its successors, the company took a fee, though the corporate life was limited to fifty years, and where it granted the land to another party before the coroprate life expired, the grantee took a fee (33); so also upon the expiration of the corporate life, under the modern rule, the land would become a part of the assets of the corporation, and continue an estate in fee.

§ 133. **Power to take by devise.** Corporations were expressly excepted in the English statute of wills of 1543, and consequently lands could not be devised to them. This was however a limitation on the power to devise to a corporation, rather than on the power of a corporation to take and hold land, and was placed in the statute of wills as an exception, in order to prevent the repeal of existing statutes of mortmain forbidding corporations from taking and holding land, unless they had a license from the king permitting them to do so. In this country (with the partial exception of Pennsylvania), mortmain statutes designed to preserve feudal incidents to lords upon the death of their vassals are not in force. In the absence of a special statute to the contrary, corporations are capable

(33) Nicoll v. Ry. Co., 12 N. Y. 121.

of taking a devise of land for any purpose necessary in carrying on their business (34). In some of the states there is a limit placed upon the amount which may be devised to them; in New York a devise in excess of this limit is void as to the excess, and the next of kin or residuary legatee or heirs may claim such excess (35); the general weight of authority, however, holds that only the state can complain, as in other cases (36). A distinction is to be drawn between limitations in a corporate charter and in statutes of wills; the former follows the corporation wherever it may be, at home or abroad, whereas the statute of wills operates only in the state enacting it. Thus, where the New York statute of wills forbids the devise of land to a corporation, a New York corporation may take land in Connecticut, under a will made in New York by a resident of New York, the Connecticut law of wills having no limitations in it, and the right to devise land depending on the law of the state where the land lies.

§ 134. **Power to acquire personal property.** The general rule is that such personal property, but such only, both as to kind and amount, as is reasonably necessary for the corporate purposes, may be lawfully acquired; but there is no limit as to the amount of personal property that may be acquired through the profits of carrying on the corporate business. For example where a packet company was organized with power to own and control vessels for transporting freight and passengers on the Mis-

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(34) For the history of these matters, see McCartee v. Orphan Asylum, 9 Cow. (N. Y.) 437.

(35) In re McGraws' Estate, 111 N. Y. 66.

(36) Farrington v. Putnam, 90 Me. 405.

sissippi river, and to own warehouses necessary for storing and forwarding property, and to do any and all business incidental to transportation of persons and property, it had no authority to purchase 4,000 bushels of wheat to be transported, and could not maintain an action against the party for failing to deliver the wheat as agreed, although payment of $1,000 had been made thereon; the $1,000 paid could be recovered in an action for money had and received (36a).

§ 135. **Power to acquire its own shares.** In the United States, perhaps the weight of authority allows a corporation to purchase its own shares, so long as the security of creditors is not impaired thereby. There is no doubt that it may do so in order to prevent loss to the company. In England and in many of the states, however, the rule is otherwise. And in those states which allow corporations to purchase their own shares, it is said they ought not to be allowed to speculate in them, and such transaction must be not only in entire good faith, but the exchange must be of equal value, free from fraud, actual or constructive, made when the corporation is not insolvent, nor in the process of dissolution, and be neither injurious to creditors, nor to the advantage of a few favored stockholders and to the injury of the others (37). The purchase of its own shares is not a reduction of the capital, if the purchase is made from profits; and the shares, even if purchased from capital, may be sold again to replace the amount paid. While the corporation owns its own shares, they are dormant and not to be voted by it.

(36a) Northwestern Packet Co. v. Shaw, 37 Wis. 655.
(37) Prince v. Pine Mt. Co. (Ky.), 32 S. W. 267.

§ 136. **Power to acquire stock in other corporations.** The general rule in the United States is that one business corporation has no general or implied authority to acquire or hold stock in another such corporation, organized either for a similar or different purpose, as an investment, for speculation, or for the purpose of controlling or managing such corporation (38). There are some cases to the contrary, as is the English doctrine. When it is necessary to prevent loss or to secure the payment of a debt, such stock may be taken. It is held a parent company may secure the stock of a branch company, and it is usual to say that authority to consolidate implies a power to purchase the stock of a company with which the consolidation might be made. Several states have by statute authorized corporations to acquire, own, hold, and vote shares in other corporations, and it is sometimes said that charitable, educational, insurance, and savings bank companies have an implied power to invest their funds in the stocks and bonds of other corporations. Where one company holds stock in another, without authority, it may collect dividends, but cannot vote, and a national bank is not liable for any statutory liability on such stock.

§ 137. **Power to alienate property.** Corporations are held to have the power to alienate their property in the ordinary course of business to any extent, if creditors, or dissenting shareholders, or the public, are not injuriously affected; if the corporation is a failing one the majority of members may dispose of all its property for the pur-

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(38) People v. Gas Trust, 130 Ill. 268.

pose of closing out its business and paying creditors, against the consent of the minority; but not otherwise. Such property as is charged with a public trust, or which is essential to the performance of the duties the corporation owes to the public, cannot be sold so as to prevent the performance of such duties. The corporate franchise cannot be disposed of without special authority, and, when that is given, the theory is that a sale of it is in effect a surrender to the state and a regranting of it by the state to the purchaser, who takes it subject to the provisions of the law as they exist at the time of the purchase (39). The power to sell includes the power to mortgage.

§ 138. **Power to act in a personal relation.** A corporation may take property that it has authority to own, in trust, and administer the trust according to its terms. In some states it is held that a corporation may be an executor, administrator, or guardian, and they are frequently authorized to be such by statute. They may also be an agent or attorney in fact.

§ 139. **Right to sue.** At common law a corporation has the right to sue anywhere that it can find the defendant and serve him with process. States may exclude foreign corporations from suing in the state courts, except as to interstate or foreign commerce, but no state can exclude a foreign corporation from suing in the Federal courts; Federal corporations also have the right to sue in the Federal courts.

§ 140. **Suits against corporations.** For purposes of suit in the United States courts, either by or against the

(39) State v. Sherman, 22 O. St. 411.

corporation of another state, it is conclusively presumed to be a citizen of the state (40), and an inhabitant of the district, in which it is incorporated (41). Alien corporations, such as are formed under foreign governments, may be sued in the United States courts in the district where they may be found doing business. Corporations of other states may be sued in the state courts of any state where they may be found doing business, if proper service of process can be made upon them; and it has been held that a corporation is doing business in a state when a traveling salesman is within the state taking orders for goods, and service of process may be made upon him in suits arising out of the business done with him. It is usual to say that the corporation must be engaged in business in the state, and that the agent must stand in some representative character to the company in order to make the service of process valid, and a personal judgment against it effective (42). Service upon an officer temporarily within the state is not generally sufficient.

§ **141. Pleading.** The courts are in conflict as to the necessity of alleging corporate existence; one line of authorities holds that the plaintiff corporation must always allege itself to be such; another line holds exactly the contrary. One line of authorities holds that, in a suit against a corporation, the plaintiff must allege that the defendant is a corporation; and others hold just the reverse. So, too, one line of authorities holds that pleading the general

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(40) St. Louis, etc. Co. v. James, 161 U. S. 545.

(41) Shaw v. Quincy Mining Co., 145 U. S. 444.

(42) St. Clair v. Cox, 106 U. S. 350.

issue or a general denial raises the question of corporate existence; others hold the reverse.

§ 142. **Right to have and use a seal.** At common law it was said a corporation could contract only under its corporate seal (43); the rule is now otherwise, and the corporation is not generally required to contract under its corporate seal in any other case than an individual would be required to do so (44); signing is now generally of more importance than sealing, although at common law sealing without signing was sufficient. Any device adopted by the corporation as a seal will be sufficient; if the seal alone is present it must be proved to be a corporate seal; if a contract is shown to have been executed by the proper officer with authority, any seal will be presumed to be the corporate seal. The presence of the corporate seal is generally held to be prima facie evidence of the agent's authority and the regularity of the corporation's actions, but this is also denied; it is said to be evidence of a valid and sufficient consideration, but it does not exclude inquiry into those matters. If present upon a negotiable instrument it does not make it non-negotiable (45).

§ 143. **Power to make by-laws.** A by-law is a regulation made in regard to the relation of shareholders and officers to the corporation, or prescribing the functions of officers, times and places of meeting, etc. (46). The power to make them is incidental to corporate existence, and resides in the shareholders, unless otherwise provided.

(43) Horne v. Ivy, 1 Mod. 18.
(44) Muscatine Water Co. v. Lumber Co., 85 Ia. 112.
(45) Chase Natl. Bk. v. Faurot, 141 N. Y. 532.
(46) State v. Overton, 24 N. J. L. 435.

This authority may be conferred upon directors. In the absence of special statutory authority, there is no power to provide by by-laws for forfeiture of shares for non-payment, or to prevent the transfer of shares, or to create a lien upon shares that will be effective against transferees without notice, or for the expulsion of members of a corporation having a capital stock.

By-laws must be reasonable, conform to the charter, to statutes, and to the common law; must operate uniformly, and not be in restraint of trade. They cannot modify vested rights, change terms as to dividends, increase or decrease liability of shareholders, or enlarge corporate powers. Members and officers, but not outside parties, are presumed to have notice of their provisions. For example, where a by-law provided that "the members pledge themselves in their individual as well as collective capacity to be responsible for all moneys loaned" to the corporation, and plaintiff loaned money to the corporation, but had no knowledge of such a by-law until after the loan was made, he could not hold shareholders individually liable (47).

Section 4. Doctrine of Ultra Vires Acts.

§ 144. **Meaning of term.** Ultra vires literally means "beyond the powers;" in its application to corporation law it means beyond the authority of the corporation—the corporation may have the power but not the rightful authority to do the act; and, since there is no authority to do the act, there is no authority to ratify it, even if all the shareholders should consent. There are various

(47) Flint v. Pierce, 99 Mass. 68.

theories as to the effect of an ultra vires act; some authorities say such acts are void, either because of a legal incapacity to do the act (48), or because it is against public policy (49). Others say they are enforceable whenever it would work injustice not to enforce them (50). The reasons for the first theory are: (1) The interest of the public that corporations shall not transcend the powers granted; (2) the interest of the shareholders that the capital shall not be subjected to risks of enterprises not contemplated by the charter; and, (3) the obligation of everyone contracting with the corporation to take notice of the legal limits of its powers. The reason for the second theory is that no one should be allowed to retain the benefits of the exercise of a power claimed, without fully discharging the obligation arising thereon. The doctrine is now confined almost exclusively to contracts, and is not applied in the law of torts.

§ 145. **As to executed contracts.** Ultra vires contracts, wholly executed by both parties, will not be disturbed on complaint of either; the court will generally leave the parties as it finds them; yet not always so, for, under some circumstances, it may help one party to secure payment or possession of property parted with under an ultra vires agreement. Thus, where a person granted land by a deed delivered to a corporation having no authority to take the land, but which did, nevertheless, and paid in full for it, the grantor could not repudiate his deed

(48) Central Trans. Co. v. Palace Car Co., 139 U. S. 24.
(49) Selden, J., in Bissell v. Ry. Co., 22 N. Y. 259.
(50) Comstock, J., in the same case.

and recover the land (51). So where a corporation, without authority to acquire or deal in lands, deeded land to the defendant, who paid one-third of the purchase price and refused to pay the balance, the court enforced full payment (52); so, where a corporation without authority to form a partnership, did so, and placed its real property in the partnership, the corporation could withdraw and, after demand and refusal to deliver, could bring suit for unlawful detention of its property (53); but a court of equity will not annul an executed ultra vires lease upon application of the lessor (54).

§ 146. **Executory contracts.** Ultra vires contracts wholly executory, that is, not performed by either party, may be repudiated by either party to the contract; in fact it is usually said to be the duty of either party to withdraw from them, and, when he does, no action for damages will lie and a court will not decree specific performance. Thus where J agreed with a corporation (which had no authority to subscribe for bonds of another company) to buy and sell such bonds on the joint account of himself and the corporation, and he did so, the corporation could not recover from J half the profits made by the purchase and sale (55). On the other hand, where a party, together with a corporation having no such authority, became surety for a third party, the first party could not recover from the corporation one-half of the

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(51) Long v. Georgia Ry. Co., 91 Ala. 519.
(52) Fayette Land Co. v. L. & N. R. Co., 93 Va. 274.
(53) Mallory v. Hanaur Oil Works, 86 Tenn. 598.
(54) St. Louis, etc. Ry. Co. v. Terre Haute & I. Co., 145 U. S. 393.
(55) Nassau Bk. v. Jones, 95 N. Y. 115.

whole sum necessary to discharge the surety obligation, though it was fully paid by him (56).

§ 147. **Partially executed contracts.** There are two general views as to the legal effect of such a contract; the rule in England, in the Supreme Court of the United States, and in several of the states, is that such a contract is absolutely void as a contract, and no action in any form can be maintained upon it (57). However, if the person who has performed his part has parted with anything of value, that may be recovered from the other party in any form of action proper for such purpose. The other view, held by a number of the state courts, is that the person who has not yet performed his part, but who accepts or retains any of the benefits received from the other party, is thereby estopped from denying the validity of the contract, and consequently it is enforceable according to its terms by the other party (58). Thus, where a corporation loans money without authority, taking a note therefor, it cannot maintain an action on the note by one view, and can by the other. So, too, where an insurance company, having authority only to insure against accidents in travelling, insured the plaintiff against accidents caused otherwise, although he had paid his premium and received his policy, he could not recover under his policy, by one view (59); although by the other and more equitable, but less logical view, where a party was insured against destruction of his crops by hail, by a company

(56) Lucas v. White Line, etc. Co., 70 Ia. 541.
(57) Central Trans. Co. v. Pullman Co., 139 U. S. 24.
(58) Bath Gas L. Co. v. Claffy, 151 N. Y. 24.
(59) Miller v. Ins. Co., 92 Tenn. 167.

authorized only to insure against destruction by fire or lightning, he can recover on the policy (60).

§ 148. **Who may complain of ultra vires contracts?** (1) The state may if the public interest is injuriously affected; (2) the parties may, except as limited in the preceding subsections; (3) shareholders may enjoin the completion of an executory ultra vires contract, and, in some cases, if they act promptly, may have an executed ultra vires contract set aside (61); (4) creditors cannot usually complain, but, where the ultra vires contract would, if performed, make the corporation insolvent, it has been held that the creditor can enjoin the performance or have it set aside (62). This matter is further considered below. Outside parties, although they may be in some way affected by the ultra vires contract, cannot enjoin its performance.

Section 5. Liability for Torts and Crimes.

§ 149. **Torts.** Corporations are liable for the torts of its officers, agents, and servants, substantially as the master is liable for the torts of his servant while engaged in the master's business; and, in this connection, the managers of the corporation are practically the corporation, the whole of the corporate duties being vested in them. Corporations have been held liable for damages from assault and battery, false imprisonment, libel, malicious prosecution (63), fraud and deceit, conspiracy, trespass,

(60) Denver F. Ins. Co. v. McClelland, 9 Colo. 11.

(61) Elyton Land Co. v. Dowdell, 113 Ala. 177.

(62) Lothrop v. Stedman, 42 Conn. 583; Cole v. Iron Co., 133 N. Y. 164.

(63) Goodspeed v. Haddam Bank, 22 Conn. 530.

nuisance, negligence, etc. It has been said they are not liable for slander, because slander cannot be committed by an agent, but this does not seem right, and recent cases repudiate this view (64). By the weight of authority, a corporation is liable for torts arising in a business that is ultra vires (65). They are liable for exemplary damages, as masters are for torts of their servants. In general, see Agency, in Volume I of this work.

An exception is made in the case of charitable corporations, such as hospitals, etc., that receive no compensation for their services; the funds of such institutions are not taken to pay damages for torts committed by their agents, such agents alone being held; some recent cases, however, take a different view.

§ 150. **Crimes.** Corporations are held liable for crimes arising out of non-feasance or misfeasance, and also for criminal libel. There seems to be no good reason why they might not be held criminally liable for many other offenses, even for felonies of the higher grade, except that the criminal laws are strictly construed, and do not usually provide penalties that could be applied to them. There is a tendency to hold them liable for such crimes as may be punished by fines (66).

Corporations are liable for contempt of court as individuals are, and may be punished therefor by fines imposed upon them (67).

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(64) Sugar Mfg. Co. v. Taylor, 130 Ala. 574.
(65) Nims v. Boys' School, 160 Mass. 177.
(66) People v. Rochester Ry., etc. Co., 195 N. Y. 102.
(67) Telegraph Newspaper Co. v. Comm., 172 Mass. 294.

CHAPTER V.

THE CORPORATION AND THE STATE.

§ 151. **General methods of control.** (1) *By the courts*: The state, by permitting actions at law and suits in equity, exercises general control over corporations as over other persons. But the state also exercises, by visitation through the courts or commissions, special control over corporations under certain circumstances. (2) *By legislative bodies*: Certain powers, such as the general regulation of all persons, whether natural or artificial, within the state, inhere in Congress and the state legislatures; other special legislative powers are frequently reserved to the state, when the corporation is created. The legislative power of the state is limited by constitutional provisions.

§ 152. **Limitations of Federal Constitution upon legislative control.** (1) *Upon Congress*: No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation; direct taxes shall be apportioned among the states according to population; bills of attainder and ex post facto laws shall not be passed; taxes or duties shall not be laid upon articles exported

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(1) State v. Milwaukee Chamber of Commerce, 47 Wis. 670; People v. Dashaway Assn., 84 Cal. 114.

from any state; preferences shall not be given to the ports of one state over those of another, and vessels shall not be obliged to enter, clear, or pay duties in another. Most of the foregoing provisions protect corporations practically the same as individuals. (2) *Upon state legislatures*: They shall not pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts; lay imposts or duties on imports or exports, or any duty of tonnage; nor abridge the privileges or immunities of citizens of the United States; nor deprive any person of life, liberty, or property without due process of law; nor deny to any person within the jurisdiction of the state the equal protection of the laws; provisions similar to the last three are usually found in state constitutions also. They operate to protect corporations, very largely as individuals are protected, except corporations of one state are not entitled to the privileges and immunities of the citizens of the several states.

Section 1. The State and Its Own Corporations.

§ 153. Control by the courts. There are five special methods available to the courts, usually authorized by statute, but existing at common law. These are: (1): Quo warranto, or an information in the nature of quo warranto, as it is now called. 2. Scire facias. 3. Mandamus. 4. Injunction. 5. Indictment. While it is usual for the attorney-general to start these proceedings (except injunction), the court itself, in order to protect the public interest in a proper case has authority to direct some one to bring them (2); and, by statute in many

(2) State v. Cunningham, 83 Wis. 170.

states, the proceedings may be on the relation of any individual.

The writ of *quo warranto* is issued to bring a corporation before the court to show "by what authority" it claims or exercises corporate franchises, and is applicable to cases where there never has been a right, as well as where there has been a cause of forfeiture, by neglect or abuse; the same end is now accomplished in a similar way by an information in the nature of quo warranto; the judgment is an ouster and seizure of the franchises. *Scire facias* is used generally where there is a legal corporation which has abused its authority, and it is called upon to "make known" why it has done so; the judgment is the same as in quo warranto. *Mandamus* is a writ issued to compel the performance of a definite corporate duty fixed by statute, charter provision, or by the common law. *Injunction* is a writ issued by a court of equity to prevent the doing of some threatened act. An *indictment* is a criminal proceeding to punish a corporation for creating a public nuisance, or other misdemeanor.

§ 154. **Causes of forfeiture.** Any abuse, misuse, or non-use, of corporate franchises to the injury of the public is cause of forfeiture by the state in quo warranto or scire facias; such as engaging in unlawful combinations; in illegal insurance, or banking; for fraudulent organizations; wilful or negligent non-user, etc. Also for usurpation of any public franchise; or imperfect or insufficient organization, or exercising corporate powers after expiration of charter; also for illegal intrusion into a corporate office.

§ 155. **Statutes of limitation and waiver.** There is an English rule that after six years have elapsed, subsequent to the cause of forfeiture, the courts will not entertain a quo warranto, upon the relation of a private individual; but no such rule applies to the state or the king—statutes of limitation do not run against the state, unless the state is expressly named. Many of the states have, however, provided that the states shall not bring quo warranto proceedings after a certain time, varying from 8 to 21 years. The legislative body may, after a cause of forfeiture has occurred, waive the state's right to complain, and the failure of the attorney-general to act has a similar, but not the same, effect; a waiver by the legislature pardons the offense, and the state cannot afterwards forfeit the charter for that offense; but the failure of the attorney-general does not pardon the offense—merely postpones action.

§ 156. **Mandamus.** This is a prerogative writ to compel the performance of a duty. Whenever a *specific* and determined legal duty is imposed upon a private corporation, expressly or impliedly, by statute, charter, or common law, and there is no other adequate remedy for its enforcement, mandamus will lie in a suit in behalf of the state to enforce the public duty, or, in case of a private right, on behalf of the person to whom the duty is due; but not to enforce a mere optional corporate privilege, or to control discretion. It has been used to reinstate a member, compel the callings of meetings, or the inspection of books, or a transfer of shares; or to compel public service companies, as water, gas, telegraph, railroad, etc.,

to perform their duties to the public, or to individuals. For example, where a railroad company, with the power of eminent domain, has constructed and operated its road, it will be compelled by mandamus to accept and transport freight, notwithstanding there is a strike of employees for higher wages, there being no violent interference by the employees (3). So, where a street railway company refused to transfer a passenger from one part of the road to another, without the payment of an extra fare, where the terms of the grant required such transfer, the passenger could compel the company by mandamus to transfer him (4). But where a corporation had merely the privilege and not the duty of placing its car tracks in certain streets, it would not be compelled to place or keep them there (5).

§ 157. **Control by courts of equity.** These courts have no general jurisdiction to dissolve corporations, though it has been held that where dissolution was necessary to prevent the continuance of a fraud, in a suit of which the court has jurisdiction because of the fraud, it could go to the extent of decreeing dissolution; such power, under similar circumstances, is frequently conferred on such courts by statute. Neither do courts of equity usually have power to enjoin ultra vires corporate acts, without other grounds of jurisdiction. An injunction may be granted upon the application of the state, whenever a corporation is abusing the power given it for a public purpose, or acting adversely to the public, or creating a

(3) People v. N. Y. Central Ry. Co., 28 Hun (N. Y.) 543.
(4) Richmond Ry. Co. v. Brown, 97 Va. 25.
(5) San Antonio St. Ry. Co. v. State, 90 Tex. 520.

nuisance, or threatening to do these; or to prevent a dissipation of the funds of a public charitable trust, when the beneficiaries are so numerous and indefinite that the trust can be preserved only through the public authority. A shareholder may enjoin the acceptance of fundamental changes, the diversion of the funds, or the completion of executory ultra vires contracts. Where one member of a corporation obtains control of it, and fraudulently appropriates all its income by an excessive salary paid to himself as president, and by excessive rent paid to himself for property leased to the corporation, a court of equity may decree dissolution to prevent the continuance of the fraud (6). So, too, the state may have an injunction to prevent the giving of a prize fight exhibition by an incorporated athletic club (7). But the state cannot, by an injunction in a court of equity, prevent an ice company from manufacturing linseed oil. The remedy is quo warranto in a court of law (8).

§ 158. **Indictment.** This has been sufficiently considered above (§ 150), in discussing corporate liability for crimes. At common law corporations were subject to indictment for public nuisance, and are now generally for such, and for violation of anti-trust, safety appliance, and pure-food laws, giving rebates, and matters of a similar kind.

§ 159. **Control by private visitor.** In the case of charitable corporations, the person who endowed the charity

(6) Miner v. Belle Isle Ice Co., 93 Mich. 118.

(7) Columbian Athletic Club v. State, 143 Ind. 98.

(8) Atty.-Gen. v. Tudor Ice Co., 104 Mass. 239.

had, at common law, the right to appoint a visitor to see if the funds were applied according to the terms of the gift; if he did not appoint any, the right to do this resulted to himself and his heirs; but, since we have abolished the English primogeniture rules of descent, and all of a man's children become his heirs, such method of visitation is impracticable, though, if not waived, the legal right yet remains. Statutes, however, usually provide other methods, and such visitorial rights, unless otherwise provided, are presumed to be vested in the corporate trustees (10).

§ 160. **Control by public visitor.** In most of the states there are railroad, insurance, and other commissioners, whose duty it is to inquire into and report upon the condition of various kinds of corporations; these are provided for the protection of the public, and have been held to be valid methods of the state in supervising such corporations as are likely to become injurious if not looked after in some such way (11).

§ 161. **Control by the legislature.** This is either: (1) Ordinary, or (2) extraordinary. In the exercise of the ordinary legislative powers corporations are subject to the power of eminent domain, the police power, and the taxing power. In the exercise of extraordinary powers, under some circumstances, corporate charters may be (a) repealed, or (b) amended.

§ 162. **Power of eminent domain.** Corporations, like natural persons, are subject to the power of the state to

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(10) Trustees of Dartmouth College v. Woodward, 4 Wheat. 518.
(11) Weld v. Gas Co., 197 Mass. 556.

take any of their property or their franchises for public purposes upon making due compensation. The general rule, however, is that property already devoted to a public use cannot be taken for another public use without express authority; and it is sometimes said that the new use must be different from the old use—that is, one railroad company could not be authorized to take the whole line of another railroad company to be operated in the same way; horse street-railways however have been taken by electric companies, and toll-roads have been taken by the state and turned into free roads. And so, where a bridge company was incorporated with the exclusive right to build a toll bridge over a river and take the tolls for its use, such bridge and the right to take tolls may be taken under the power of eminent domain, and upon payment therefor may be converted into a free bridge (12).

§ 163. **Police power.** Corporations are subject to the police power of the state, the same as individuals; although they may be chartered for the express purpose of carrying on a lottery or manufacturing liquor, subsequent legislation may forbid such acts, without impairing the contract, for the reason that no one can obtain a vested right in any business that is dangerous to the public health, the public morals, or the public safety. The state cannot surrender or barter away its control over these subjects. Under this power, also, the rates to be charged by a public service company (within the limit that forbids depriving them of their property without due process of law) may be fixed or regulated; so reports from in-

(12) West River Bridge Co. v. Dix, 6 How. 507.

surance, trust, building and loan, bank, and other like companies, may be required for the protection of the public. The general limits to this power are that, in case of lawful businesses, property cannot be confiscated by the state, vested rights divested, nor the performance of national functions interfered with, by the state legislature. For example, where a lottery company paid five thousand dollars to the state, and agreed to pay one thousand dollars as an annual tax for the privilege of carrying on a lottery, for twenty-five years, the state could revoke this privilege at any time, without specifically reserving the right to do so, and without repayment to the corporation of any money received (13). Or, a state can pass a law repealing an existing license law, and forbid the further manufacture of liquors and sale of liquors made prior to the prohibitory law, without "depriving any one of his property without due process of law" (14).

§ 164. **Taxation.** The state's power to tax corporations is the same as in the case of individuals. The corporate elements of taxation are (15): (1) the primary franchise; (2) the secondary franchises; (3) the property, real or personal, tangible or intangible; (4) the capital stock authorized, subscribed, or paid in; (5) earnings, gross or net, or profits; (6) the shares of stock owned by shareholders. It is possible that all of these might be taxed at one time without being illegal, though it would be what is in some sense double, or treble, or quadruple

(13) Stone v. Mississippi, 101 U. S. 814.

(14) Mugler v. Kansas, 123 U. S. 623.

(15) Farrington v. Tennessee, 95 U. S. 679.

taxation. The matter is statutory, and there is but little uniformity in the statutes or the decisions of the various states upon the subject of corporate taxation.

§ 165. **Taxation of franchises.** It is not usual to separate the primary franchise—the right to be a corporation and exercise corporate powers—from the secondary franchises, such as the right to occupy the streets by a street railway, for the purpose of taxation. Some courts seem to think that, since the state charges a very small fee or none at all for incorporation, the primary franchise has no value (16); the proper view, however, seems to be that its value is whatever it adds to the convenience, efficacy, and safety of conducting the business by the corporate form of organization over other forms; in other words, what would those who have it give for it rather than do without it (17). Its value is difficult to estimate, and many rules for ascertaining its value have been suggested. Without attempting to separate the primary and secondary franchises, these two methods of valuation have been approved: (1) Find the market value of all the shares and bonds of the corporation; from this subtract the assessed value of all the real and personal property, and the balance will be the value of the franchise. (2) Ascertain the total net earnings (usually the average for a period of years); capitalize these at the average rate of interest upon short loans; from the total amount so found, subtract the assessed value of the real and personal property, and the balance represents the value of the fran-

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(16) Detroit Citizens Ry. v. Common Council, 125 Mich. 673.
(17) Bank of California v. San Francisco, 142 Cal. 276.

chise; both of these in fact are based upon the earning capacity of the capital of the corporation, and is the business man's estimate of its value (18).

The situs of the secondary franchise, such as operating a street railroad, for purposes of taxation, is where the line is operated; the same is true as to a railroad corporation. The situs of the primary franchise is usually considered as being at the principal office of the corporation; it undoubtedly can be, however, considered as having a situs wherever the corporation does business, in proportion to the business done; and it is usually so considered when business is done in two or more states.

§ **166. Taxation of property.** The corporate property of whatever kind is subject to taxation, the same as that of individuals. There is a tendency now to consider the property as a unit devoted to a special purpose, and to have all of it assessed by one state board instead of by local assessors. After it is assessed by the state board, the apportionment may be, and frequently is, made among the various local subdivisions of the state, in proportion to the business done in these districts, or mileage therein, in the case of railroad or telegraph companies, etc. In administering taxing laws it is not usual to consider that the term "property, real and personal," includes "franchises" unless expressly so provided, yet the legislature may so direct, and provide a method of valuation (19). And where the statute required all property to be taxed at its true value in money, and directed the assessors, in

(18) Spring Valley W. W. v. Schottler, 62 Cal. 69.

(19) People v. State Board, 174 N. Y. 417.

determining the value of express, telegraph, and telephone companies, "to be guided by the value of said property as determined by the value of their entire capital stock," such proportion of the total value of the capital stock of an express company could be considered as located in Ohio, as the value of the tangible property in Ohio bore to the total value of all the tangible property of the company, wherever located (20). Patents and copyrights are not the subjects of state taxation, but good will may be taxed where the corporation does business. Patented articles and copyrighted books, etc., are taxable as property. The states cannot tax the franchises of a national corporation without the consent of Congress, nor can they tax any national government agency.

§ 167. **Taxation of gross or net earnings.** These may be the basis of taxation by the state in the case of corporations not engaged in interstate commerce, or upon such earnings as are not derived from such commerce. But the states cannot directly tax corporations upon the monthly or yearly earnings derived from such commerce, though of course they can tax them upon any money or property found actually in their possession on the assessment day, from whatever source derived; this is a tax on property and not earnings. It has been held also that corporations may be taxed upon their capital stock, and the tax rate may be graded according to the gross or net earnings, or dividends, whether they are partly derived from interstate commerce or not; this is on the theory that the

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(20) Adams Ex. Co. v. Ohio, 165 U. S. 194, 166 U. S. 185.

tax is on the property and not on the earnings for any period (21).

§ 168. **Taxation of shares.** These are taxable, although the property or capital stock is taxed, and whether this is at its actual or at its face value. In several states this is held not to be double taxation (22), though others hold otherwise. The situs of shares for the purposes of taxation is usually the domicile of the owner, but the state may make their situs to be that of the domicile of the corporation, and tax them there, even though their owner lives in another state and is taxed there on the same shares (23). It has been held that alien owners may be taxed higher than resident owners, but this is not the case if the owner is a citizen of the United States residing in another state.

§ 169. **National taxation of state corporations.** The national government has the same power to tax state corporations and their property, as it has individuals and their property. The Federal taxing power can be used for the purpose of regulation as well as raising revenue (24).

§ 170. **Repeal and forfeiture.** These have already been mentioned under dissolution. If there is no power reserved to the state legislature, it cannot repeal any corporate charter, although Parliament and possibly Congress may do so; if the power to repeal is reserved without qualification, it may be exercised at any time, with or

(21) Maine v. Grand Trunk Ry. Co., 142 U. S. 217.

(22) Thrall v. Guiney, 141 Mich. 392.

(23) Tappan v. Merchant's Bank, 19 Wall. 490.

(24) Veazie Bank v. Fenno, 8 Wall. 533.

without giving any reason for so doing. Vested property rights are not destroyed however by such repeal (25); if the power to repeal is reserved upon the happening of some condition, some cases hold that there must be a judicial determination that the condition has happened, before the legislature can act; other cases hold that the matter is wholly within the power of the legislature to determine. The courts are not altogether in accord as to the effect of the repeal of general corporation laws—whether they affect the existence of corporations formed under them or not. If the power to repeal is reserved, the effect of such repeal seems to be merely a question of legislative intent, with the presumption that existing corporations are not affected, unless clearly so intended.

No reserve power is necessary for forfeiting corporate franchises for abuse or non-use; this power is implied from the nature of a franchise, and can be enforced only in the courts after a proper judicial determination of the facts. A court of law alone has the power to dissolve for breach of duty, and generally only on the complaint of the state by the attorney-general.

§ 171. **Amendment.** Since a charter is a contract, the general rule here is that it can be amended only by consent of both parties, that is, the state and the corporation; and further, since there is also contained in the charter a contract between the corporation and each member, the corporation cannot accept an amendment unless each member consents; and this is the rule in this country concerning material amendments, when the state has not

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(25) People v. O'Brien, 111 N. Y. 1.

reserved the power to amend. Under the transcendent power of Parliament, however, a material amendment could be imposed upon the corporation without its consent or that of its members—or they could be required to stop business. Perhaps Congress has a like arbitrary power as to corporations created by it. Under a reserved power to amend, the states have much the same power as Parliament—that is an amendment, even though material, may be tendered, and, if not accepted, the state may take away the corporate life (26). But in this connection it has been held that what the state offers must be an *amendment,* not something wholly new and different, such as requiring a banking company to build a railroad.

Two views are taken, also, as to the power of the majority to accept an amendment, if the power to amend is reserved to the state when the corporation is formed. One line of cases holds that the majority have the power to accept what are generally considered material amendments, against the dissent of the minority; other cases hold that unanimous consent is necessary. The difference here is more as to what constitutes a material amendment, than as to the rules relating to its acceptance. One case holds that extending a railroad from 60 to 90 miles is immaterial, and a majority may accept such an amendment (27); while another holds that extending a 5 mile railroad to 12 miles is material and requires unanimous consent (28).

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(26) Yeaton v. Bank, 21 Gratt. (Va.) 593.

(27) Buffalo, etc. R. Co. v. Dudley, 14 N. Y. 336.

(28) Zabriskie v. Hackensack Ry. Co., 18 N. J. Eq. 178.

Section 2. The State and National Corporations.

§ 172. **In general.** National corporations are not foreign corporations in any state, unless they are created to operate in one of the territories or in the District of Columbia; in which case their status is substantially the same as if created by the legislature of one of the states, Congress merely acting as the local legislature in these cases. But corporations created by the national government to perform its national functions, to operate in any state, are not foreign corporations in any state. By the national banking act, a national bank located in any particular state is for most purposes treated as a citizen or inhabitant of that state; it, however, cannot be taxed in such states, or the exercise of its powers be restricted by the state where located, in any other way than as is expressly authorized by the national laws. For example, where the statutes of Pennsylvania provided that no foreign corporations should have an office in that state, without obtaining a license from the state, for which an annual charge was made, it was held that a railroad company chartered by Congress to build a road from Texas to California, and having an office in Philadelphia, was not a foreign corporation in that state, and subject to the license law thereof relating to foreign corporations (29).

Section 3. The State and Foreign Corporations.

§ 173. **Right of a foreign corporation.** Strictly speaking the states of the Union are foreign to each other in most matters relating to corporation laws; the owner-

(29) Comm. v. Texas & Pac. Ry., 98 Pa. St. 90.

ship of property, so long as it is legal in any state, by a corporation organized in another state, is protected as the property of an individual is, and, so long as its acts within the state are legal, it is protected by the national constitutional provisions. Its rights, however, to do business (except interstate commerce) in another state than the one creating it, is based upon mere *comity* and cannot be claimed as a legal right; it has the *power* to do business anywhere (if not limited by its charter), but its *right* to do business, in any other state than the one creating it, depends upon the consent of the state where it seeks to do business. Thus, where a Georgia bank had a general power to purchase bills of exchange, a purchase made by it in Alabama, without objection on the part of that state, is a valid exercise of corporate powers (30). So, an Indiana corporation, which through an agent in Louisiana sells meats in that state, can be charged an annual license tax upon the business done locally by the agent in the state (31), though the license tax is higher than the license tax charged to domestic corporations engaged in the same business. But where the goods are shipped by a foreign corporation, in distinct packages, to one in another state who took orders for them, and who examines them, and, if found all right, delivers them, collects the price, and remits to the corporation, such transactions are interstate commerce, and cannot be prevented or taxed by the states (32).

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(30) Bank of Augusta v. Earle, 13 Pet. 519.

(31) State v. Packing Co., 110 La. 180.

(32) Rearick v. Pennsylvania, 203 U. S. 507.

§ 174. **Right to engage in commerce.** While the general rule, as stated above, prevents a foreign corporation from entering, and establishing a place of business, and exercising its corporate franchise there, without the consent of the state, any corporation, just as a natural person, under the national Constitution, has the right to engage in interstate or foreign commerce—and this cannot be excluded or controlled by any state. Thus, where an Ohio manufacturing company, through its agents, made a contract in Colorado to make in Ohio and deliver in Colorado, an engine, the corporation could sue in Colorado for the price, though it had not complied with the statutes of Corolado in regard to doing business in that state as a foreign corporation (33). The questions, what is interstate commerce, when it begins and ends, and what incidents of it may be regulated by the state, are fully discussed in Constitutional Law, Chapter XIV, in Volume XII of this work.

§ 175. **Right of state to exclude.** Within the limits above given, any state has a legal right to exclude or discriminate against any corporation organized in another state (that is not an agent of the national government), for any reason or without any reason. And, after it has once granted a license to do business in the state, this license can be revoked at any time, though a valuable consideration was paid for it, without violating the national constitutional provisions; but, if the grant indicates a "contract right to do business in the state, during the corporate lifetime without being subject to any greater lia-

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(33) Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

bilities than then were or might be imposed upon domestic corporations,'' the state cannot change the terms without consent of the foreign corporation, nor exclude it for not consenting (34). As an illustration of the general rule, it was held that where foreign insurance companies had been licensed to do business in the state, and had done so for many years, paying the license tax regularly, a new license tax could be imposed upon such corporations from other states of 2½%, and on those from other countries of 3½%, upon premiums paid in the state, although domestic corporations were required to pay only one per cent (35).

§ 176. **Methods of exclusion or restriction.** The statutes usually provide: (1) That, before doing business in a state, a foreign corporation shall appoint some one within the state, upon whom service of summons in suits against the corporation shall be made; (2) that, when the corporations of state A are excluded by state B then state A will exclude the corporations of state B—these are called retaliatory laws; (3) that suits against such foreign corporations shall not be removed by it to the Federal courts. While a provision of this latter kind cannot prevent the removal of a suit to the Federal courts, the state may afterward exclude the foreign corporation, that so offends, from doing business in the state (36).

Certain penalties are usually provided for violating these provisions. The state can collect the penalty or

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(34) American S. & R. Co. v. Colorado, 204 U. S. 103.
(35) Manchester Fire Ins. Co. v. Herriott, 91 Fed. 711.
(36) Doyle v. Ins. Co., 94 U. S. 535.

oust the corporation for non-compliance. Much controversy has arisen as to the validity of contracts made with a corporation that has failed to comply (37); the weight of authority probably is that if a penalty is imposed, either on the offending corporation or its agent, that is the exclusive remedy, the validity of the contract is not affected, and it may be enforced; this is particularly true when the complaining party, who seeks performance of the contract, is the person contracting with the corporation, since such a provision is specially designed for his protection; and, if the corporation is complainant, many of the cases hold it can enforce a contract made by it before it complied with the law, but others hold otherwise. Another view is that, if there is no penalty and the corporation has not complied, the contract is void and unenforceable by either party to it. This does not seem reasonable, so far as complaint is made by one contracting with the corporation, since the law is designed for his protection instead of his injury. The courts also are not in accord upon what is "doing business," in violation of these statutes; one line of cases holds a single act of the kind the corporation was formed to do, if done without compliance with such statutes, violates them; while others hold there must be several acts, amounting to "carrying on" business.

§ 177. **Visitorial power over foreign corporations.** In general, a state has no visitorial power over the internal concerns of a foreign corporation doing business within its territory, except so far as it has compelled it to be-

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(37) Toledo Tie Co. v. Thomas, 33 W. Va. 566.

come a domestic corporation, as a condition of doing business within the state. It may, of course, oust it from the state, but cannot dissolve it; it may appoint a receiver for such corporations as are doing business within the state and have property there; but, if it has no place of business within the state or no officers or no property there, it cannot do so. What are "visitorial powers" and what are "internal concerns" are not very definitely settled: but to compel an assessment upon the stock; or "to entertain an action to dissolve a corporation; to determine the validity of its organization; to determine which of two rival organizations is the legal one, or who of rival claimants are its legal officers; to restrain it from declaring a dividend, or to compel it to declare one; to restrain it from issuing bonds or from making an additional issue of stock—would clearly all be the exercise of visitorial powers over the corporation, or an interference with the management of its internal affairs" (38); yet, to compel the issue of a new certificate of stock to replace a lost one, or to direct the corporation to allow a member to inspect the corporate books already in the state, are not such as are beyond the power of the state to enforce

Section 4. The National Government and State Corporations.

§ 178. **Taxing power.** Under the taxing power of the United States government, it has been held that state banks with power to issue bills and notes can be taxed by the national government so heavily as to make it im-

(38) Guilford v. W. U. Tel. Co., 59 Minn. 332.

possible for them to do a profitable business of this kind, and this is true even if the national government did this for the express purpose of protecting the national bank issues and destroying the state bank issues (39). This power has been suggested to be such that state corporations which engage in interstate commerce can be taxed so heavily by the national government upon such business that they cannot profitably do such business, and, in that way, the national government can control, by naming conditions or requiring a license, the recent corporate trusts. No case has yet been decided, but the legislation of Congress just enacted as a part of the tariff programme, providing a tax upon corporate net earnings, may be the first step in that direction. In the case of the bank it was allowed to reorganize as a national bank and thereby come directly under the national control (40). It seems that this method might be used to compel corporations engaged in interstate commerce to incorporate as national corporations, if a Federal law were enacted for that purpose. Much of the vexatious variety of state legislation, now casting a great burden of expense upon such corporations in order to comply with it, might be avoided and uniformity obtained thereby.

§ 179. **Adopting state regulations.** Undoubtedly, though Congress has exclusive regulation of interstate commerce, it may adopt regulations made by the states that have the effect to exclude corporations or others from carrying on business that they otherwise would have the

(39) Veazie Bank v. Fenno, 8 Wall. 533.
(40) Casey v. Galli, 94 U. S. 673.

right to do, against the state's consent, as interstate commerce. In this way the national law makes it illegal to sell interstate liquor in any state that has a prohibitory liquor law, contrary to that law.

CHAPTER VI.

SPECIAL RELATIONS.

Section 1. The Corporation and Its Promoters.

§ 180. **Duties of promoters.** The promoters owe to the corporation the general duty to take no advantage of it; if they, while engaged in promoting the company, *buy property for the corporation,* they must let the corporation have it at the price paid by them for it; this is because they are in a relation of trust toward the unborn corporation, when they are acting for it (1). If they own property, and purchase it from themselves for the corporation, while engaged in promoting the corporation, they must not pay more than the property is worth. If they own or acquire property for themselves, while not acting for the corporation, they have the perfect right to sell it to the corporation at any price they can obtain, provided they do not themselves, or by their dummies, represent the corporation in making the purchase. These last two statements, however, are probably subject to the qualification that, if the promoters are themselves the only parties interested in the corporation at the time and no public subscription for shares is to be called for, or, if all the shareholders know all the facts and ratify the acts or do not object, a large amount of stock may be

(1) Chandler v. Bacon, 30 Fed. 538. See 54 Am. L. Reg. 65, 123.

issued for property of little value, and purchasers of shares from original shareholders, who took their shares with full knowledge of the facts, cannot complain. Only creditors, without knowledge, can complain that the stock is unpaid, when the corporate funds are insufficient to pay their claims. There are however some conflicting views upon these matters.

§ 181. **Same: Illustration.** T and A on January 20 signed articles of incorporation of a railroad company; on February 17 bought 40 miles of a graded railroad bed, with right of way, for $15,000; on February 20 filed the articles of association, at which time corporate life began, the company to have $3,600,000 capital stock; immediately thereafter organized by electing themselves and two others, to whom they had sold an interest in the roadbed, directors and officers of the company; in May offered to sell the roadbed to the company for the $3,600,000 capital stock and $200,000 in money; in November this offer was accepted by the directors and the stock ordered transferred to the owners of the roadbed; this was then done; a little later at a meeting of the stockholders, who so received their stock, all being present, a resolution was unanimously passed approving and ratifying the foregoing transactions. In a suit by the company, after these parties had sold their stock to others, to have these transactions set aside, and the stock and money, above the $15,000 paid by the parties for the roadbed, returned to the company, it was held there was no liability (2).

(2) St. Louis, etc. Co. v. Tiernan, 37 Kan. 606. Compare Old Dominion Copper Co. v. Bigelow, 188 Mass. 315, and Old Dominion Copper Co. v. Lewisohn, 210 U. S. 206.

§ 182. **Liabilities to corporation or its shareholders.** For all profits made by them in promoting the company, or while acting for it, promoters are liable to the corporation or its shareholders, when the public are to be called on generally for subscription to shares and full information is not given to the subscribers, or they are misled into believing no profits are made or to be made. Thus, where K obtained an option from V to purchase a tract of land for $31,000, and then associated P with him for the purpose of organizing a corporation for the purchase of the same land for $55,000, and prepared a subscription paper so worded as not to disclose the true ownership of the land, but to induce the signers to believe it belonged to V, and to bind them to join in forming a corporation to purchase such land for $55,000; and, in order to induce the signers to believe that K and P purposed to become stockholders on the same basis as the others who joined in the apparently mutual enterprise, each signed for $10,000 of stock, and the corporation was formed, K and P elected directors and managing officers, and the sale was completed, ostensibly by V, for $55,000, but really for $31,000, K and P dividing the difference—the other subscribers may in equity have the contract rescinded and recover their money, or may charge K and P as trustees for the profits and have an accounting, or may sue them at law for damages for fraud (3). On the other hand, where the promoter similarly acquired an option on property for $6,000 and organized a corporation to purchase it, but, in his subscription paper, described the land proposed to

(3) Hebgen v. Koeffler, 97 Wis. 313.

be purchased and stated "I hold the option and agree to sell all my rights therein to said company for $8,500 when it is organized," neither the company nor any subscriber could complain that the promoter made a profit of $2,500, since he did not pretend to be selling the property of another party, and going in with the subscribers on a pretended equality to purchase it at a price not known to them but known to him to be false (4).

§ 183. **Liability to party dealt with.** Promoters are personally liable to one dealing with them, even though their dealing is in the name of the corporation, for the reason that there is in fact no principal in existence that they can represent (5). This liability perhaps can be excluded by drawing the contract in a way that makes the corporation alone liable, if any one.

§ 184. **Liability among themselves.** As between themselves, so far as they act in forwarding the scheme of incorporation in accordance with their agreement, they are substantially partners for the particular purpose, and one is bound by the acts of the others in carrying out the scheme in the way contemplated. But, as to the other matters, only those who authorize, consent, or ratify the acts of the others become liable therefor (6).

§ 185. **Liability of corporation for acts of promoters.** Inasmuch as the corporation does not come into existence, until after the promoters' acts bring it into existence, it

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(4) Richardson v. Graham, 45 W. Va. 134.

(5) Weatherford, etc. Co. v. Granger, 86 Tex. 350; Hinkley v. Oil Co., 132 Ia. 396.

(6) Pirtsch v. Milbrath, 123 Wis. 647; Roberts, etc. Co. v. Schlick, 62 Minn. 332.

cannot be a party to a contract made for it by its promoter, and so is not liable thereon, unless it expressly or impliedly adopts the acts or contract after it has come into perfect existence (7). The adoption of a promoter's contract by the corporation is really making a new contract, which dates from the time of adoption and must be entered into with all the formalities then required to bind the corporation (8); and this is not properly termed a ratification, for that implies the existence of a principal at the time the agent makes the contract. See Agency, § 22, in Volume I of this work.

Section 2. The Corporation and Its Officers.

§ **186. General relation.** There are three theories as to this relation: (1) That the officers, including directors, are merely *agents* of the corporation or the shareholders; this is not quite correct, for the directors have the power to act in good faith in a way that does not coincide with the shareholder's view. (2) That they are *trustees;* this view is not entirely correct, for there is no separation of the titles to the corporate property into legal and equitable, and a vesting of the legal title in the trustees and of the equitable title in the corporation, as there would be in the case of a true trust. (3) That they are *mandataries*; this is not altogether correct, for there is no vesting of the legal possession of the corporate property in them as a special property, as there is in the case of bailees. The truth is the relation of directors and officers

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(7) See note 5, above.

(8) McArthur v. Times Co., 48 Minn. 319.

is sui generis, involving relations analogous to all of the above, but not exactly the same as either.

These theories may be illustrated thus: A shareholder brought an action on the case for damages against the director of a bank for loaning money without security. Held, such suit could not be maintained—the corporation must sue, for the director was *its agent* (9). A receiver of a corporation brought a bill in equity against a director for misappropriating the corporate funds to his own use; held, in Illinois, that the director was the trustee of an express trust, and could not successfully plead the statute of limitations for that reason (10). On the same facts, Tennessee holds the directors are only implied trustees, and statutes of limitations run in their favor (11).

§ 187. **General rule as to duties.** They owe the corporation the duty to exercise diligence and care and a reasonable business judgment and prudence in managing the corporate affairs, and, for failure in this direction, they may be held in an action for damages by the corporation (12); some cases say they are liable only for gross negligence in managing the corporate affairs, or selecting unfit servants, or failure to use ordinary care to supervise their acts afterward (13); they have no right to any profits made by them while working for the corporation; all such belong to it and may be recovered by it.

§ 188. **Right to remove corporate officers.** There is no

(9) Allen v. Curtis, 26 Conn. 456.
(10) Ellis v. Ward, 137 Ill. 509.
(11) Wallace v. Sav. Bank, 89 Tenn. 630.
(12) North Hud. Bldg., etc. Assn. v. Childs, 82 Wis. 460.
(13) Swentzell v. Penn. Bank, 147 Pa. St. 140.

well-defined power to remove elected officers—as directors, president, etc.—who are elected for terms fixed in the charter, general law, or by-law, before the term has expired (14); this may be provided for by by-law provision allowing it; a court could, upon proper showing, remove such officer if he were violating his trust, in a way similar to the removal of other trustees. Agents, though hired for a definite time, may be removed, subject to liability for damages if removed without cause before their time of service has expired; if not hired for a definite time, they can be removed at any time by the corporation without making itself liable for damages.

§ 189. **Rights of officers to manage the corporate business.** So long as corporate officers act in good faith, with due care, and keep within the corporate powers and those conferred upon them, they cannot be prevented from managing the business according to their best judgment, and neither shareholders nor the courts can interfere (15).

§ 190. **Right of officers to deal with the corporation.** The general rule here is that the officer cannot rightfully represent both himself and the corporation in making a contract with it; any such contract is voidable by the corporation or its members, even though in fact it was fair and reasonable, by one line of cases (16); but by another and perhaps the better view, if the contract is made in good faith and free from fraud, it is not so voidable (17). If the corporation, however, is represented by other

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(14) In the Matter of Election of Directors, 63 N. J. L. 168.

(15) Blood v. La Serena, 113 Calif. 221.

(16) Munson v. Ry. Co., 103 N. Y. 58.

(17) Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

officers that have power to act for it in the transaction, there is nothing forbidding an officer from dealing with it, and such contract is valid. The same rule applies to corporations having common directors or officers (18) dealing with each other through such officers; if they are represented by non-common officers who could bind it by their action, the contract is valid; otherwise voidable.

§ 191. **Right to salary.** The general officers of corporations, including directors, are supposed to serve in their capacities as such without compensation, and hence, after they have so acted, they cannot, without consent of shareholders, be voted salaries as back pay (19), for such a thing would be giving away the corporate funds. For any extraordinary service not included in the ordinary functions of the office, there is an implied promise to pay, and in such case the directors have the right to fix the amount. The shareholders usually reserve the right to themselves to fix the salaries of the general officers, and leave to the directors the right to fix other salaries. There is an implied promise to pay any officer or any person, who devotes his whole time to the service of the company in ways other than merely performing the duties of his office.

§ 192. **Right of officers to resign.** A corporate officer may resign at any time, even though the statute provides they shall continue in office until their successors are appointed, and this may be done without giving notice to the public or to those dealing with the corporation (20).

(18) Aldine, etc. Co. v. Phillips, 129 Mich. 240.

(19) National Loan, etc. Co. v. Rockland Co., 94 Fed. 335.

(20) Briggs v. Spaulding, 141 U. S. 132.

No acceptance of the resignation is necessary to make it effectual. But the resignation of officers for the purpose of preventing the bringing of any suit, or the service of process, or of enabling a receiver to be appointed, is ineffective. Salary and liability cease with the resignation (21).

§ 193. **Right of officers to deal with shareholders.** There is some conflict upon this matter. It is usual to say that directors and officers do not stand in any relation of trust and confidence toward individual shareholders, and consequently can deal with them as if they were strangers, and are not obliged to give them any information unless called for, that may affect the value of the shares, even though they seek to buy shares from such shareholders (22); but there are some recent cases to the contrary, including a decision of the Supreme Court of the United States, reversing a decision of the supreme court of the Philippine Islands (23). It was held here that the managing director of a church-landowning corporation, having shares, and whose lands were about to be purchased by the government at a price that would greatly enhance the value of the shares, was under a duty to inform a shareholder from whom he sought to purchase shares, of the facts known to him concerning the probable sale of land to the government.

§ 194. **Right to contribution.** Where directors wrongfully pay dividends out of capital to shareholders who know the facts, and such directors are held liable to

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(21) Zeltner v. Brewing Co., 174 N. Y. 247.

(22) Deaderick v. Wilson, 8 Baxter (Tenn.) 108.

(23) Strong v. Repide, 213 U. S. 419.

creditors for the amount so paid, they can recover the amount from the shareholders who knowingly received it; but, if the shareholders did not know the facts, they would not be compelled to refund (24). And where directors jointly wrongfully waste the corporate funds, one who has been compelled to make good the loss cannot enforce contributions from the others (24), the ordinary rule relating to joint wrong-doers applying.

§ 195. **Liability of officers.** The liability of officers to the corporation is considered above, and to the shareholders and creditors hereafter. To third parties, or to those who deal with the corporation, the corporate officers are liable for their own wrongful acts, and cannot shield themselves behind the liability of the corporation as their principal. Thus, where an officer, without authority to issue a note for the company, falsely claimed he had such authority, he is liable to an innocent holder of the note; but, if he had authority to issue notes for a proper purpose and abuses that authority, he is liable not to the innocent holder but to the company, which is liable to the holder (25). So, too, where the manager of a lumber company put a known inexperienced workman to work with a defective machine known to be dangerous, whereby the workman was hurt, the act of the manager was not mere non-feasance, but a misfeasance for which he is liable (26). So, also, a manager who keeps giant powder

(24) Moxham v. Grant, 69 L. J. (Q. B.) 97.
(25) Dexter Sav. Bk. v. Friend, 90 Fed. 703.
(26) Greenberg v. Lumber Co., 90 Wis. 225.

in a dangerous quantity and place, for a corporation, is liable for the damage due to explosion (27).

SECTION 3. THE CORPORATION AND ITS SHAREHOLDERS.

§ 196. **In general.** The corporation has a right not to have its existence denied by its shareholders—they are estopped; it has a right to issue preferred stock under some circumstances; to regulate transfers; to carry on the enterprise as the majority of the directors shall direct; to accept amendments, under some circumstances by a majority vote, and, if in failing circumstances, to dissolve itself. These matters have been considered.

§ 197. **Right of corporation to collect subscriptions.** In all the states except those of New England, every subscription to stock that does not so state otherwise is considered as including an implied promise to pay for the shares when the corporation needs the money (28); it is not usually a debt due immediately upon the subscription (though some statutes make part of it such), but only an agreement to pay when demanded by the proper corporate authorities.

§ 198. **Calls.** Before any particular amount is due upon any subscription a *call* is to be made by the directors; this at common law was simply passing a resolution saying that a certain per cent of the amount subscribed should be due and payable at a certain time (29). Every shareholder was supposed to take notice of such resolu-

(27) Cameron v. Kenyon Connell Co., 22 Mont. 312.

(28) Gettysburg Natl. Bk. v. Brown, 95 Md. 367; Hughes v. Mfg. Co., 34 Md. 316.

(29) Budd v. Multonomah Co., 15 Ore. 413.

tion, and was in default if he did not comply with it; it is usual now to require notice of some sort to be given of the fact of making the call, and also of the time and place it shall be payable. It becomes a debt due the corporation as soon as due, and may be sued for by the corporation; to be valid, calls must operate equally and be uniform on all. There is no right, unless expressly conferred, to call for any more than the face value of the amount subscribed, or the amount agreed to be paid in the subscription contract (30). Calls should be made by directors legally elected (31).

§ 199. **Evidence of membership.** The cases are not agreed as to this; one line of authorities holds that the corporate records, such as the stock and transfer books, are prima facie evidence as to who is a member, even against one who does not claim membership (32); the better view is otherwise (33). Such records would properly be evidence of membership against the corporation, and, with some propriety, might be considered such in favor of corporate creditors. Such records are not, however, conclusive. A certificate of shares is not necessary to constitute one a shareholder.

§ 200. **Right to vote.** At common law every member had a right to one vote on every proposition, and no more. Voting was not according to shares owned; now, by custom, by-law, and statute or charter, the rule is almost universally the other way, and a shareholder has one

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(30) Enterprise Ditch Co. v. Moffitt, 58 Neb. 642.

(31) Moses v. Tompkins, 84 Ala. 613.

(32) Glenn v. Orr, 96 N. C. 413.

(33) Carey v. Williams, 79 Fed. 906.

vote for each share owned (34). Preferred stock may be issued without the right to vote, though the statute says each share shall be entitled to one vote (35). The holder of the legal title has the right to vote; executors and administrators vote the stock belonging to the estate before distribution; the corporation cannot vote its own shares held by itself; a shareholder can vote as he sees his personal interest, even though such is in conflict with the corporate interest; but, if he owns a majority of the stock, he must not commit a fraud, or deprive the minority shareholders of their legal rights in the corporate business and profits.

§ 201. **Proxy.** At common law the member, unless the charter expressly authorized, had no right to vote by proxy, but must vote in person (35); now, statutes universally allow voting by proxy, which is simply the appointing by the shareholder of some one to be his proxy or attorney in fact to attend a certain meeting and vote all the shares that his principal owns, upon all questions lawfully coming before that meeting, as fully as the owner could if he were present. No special form is essential, unless by-laws, charter, or statutes expressly so require.

§ 202. **Irrevocable proxy.** There have been some attempts to make proxies irrevocable—but they cannot be so made, even for a consideration; they are considered such a separation of the interest in the stock and in its control as are contrary to public policy; hence, anyone

(34) Comm. v. Detwiler, 131 Pa. St. 614.
(35) State v. Swanger, 190 Mo. 561.

that has given an irrevocable proxy can cancel it at any time (36).

§ 203. **Voting trusts.** Voting trusts are agreements among shareholders to vote all the shares they own in the way the majority of the parties to the agreement direct, or in the way some trustee or outside party shall direct; when entered into for the purpose, and having the effect of placing the control in a minority of the shareholders, they have generally been held voidable and unenforceable at the option of any party to the agreement (37). In some cases, where they serve the purpose of sustaining or preserving rights that otherwise might be in peril they have been upheld (38); and they are generally upheld in California and New York, the latter having expressly legalized them by statute.

§ 204. **Cumulative voting.** This is a method authorized by statute, which allows the minority of shareholders a chance to obtain representation upon the directorate. If A owns ten shares of stock in a corporation having five directors, he would have the right to vote ten shares for each director separately, and this is the usual and the only way unless some other method is expressly provided. The cumulative method would permit A, instead of casting 10 votes for each of five directors, to cumulate them and cast the entire 50 votes for one and none for the others, or 25 for each of two directors to be elected, or in any other way to divide his votes, not exceeding 50 in all (39).

(36) Cook, Stock and Stockholders, §§ 610, 622.
(37) Harvey v. Linville Co., 118 N. C. 693.
(38) Smith v. San Francisco, etc. Co., 115 Calif. 584.
(39) Pierce v. Comm. 104 Pa. St. 150.

Under the reserved power to amend, a corporate charter can be amended, and the amendment can be accepted by a majority of shareholders against the protest of the minority, authorizing cumulative voting (40).

§ 205. **Dividends.** A dividend is a sum set aside out of the corporate profits to be divided among the shareholders in proportion to their holdings; dividends must, in order to be valid, be declared out of the corporate profits—that is, the balance after all current expenses of operation are paid, and fixed charges and losses in capital are provided for. When the corporation has earned profits which could be applied to the payment of dividends, and also has the power to increase its shares of stock, it may keep the money and declare a *stock* dividend by issuing shares instead, to an amount in face value equal to the profits to be divided (41). Before dividends belong to the shareholder and cease to be the property of the corporation, they must be *declared* by the board of directors, and the *funds set aside* to pay them; from that time the shareholder is considered part owner of the fund so set aside, though not yet due (42); without this setting aside of a particular fund or amount, out of which payment is to be made, the shareholder is a mere creditor to the amount declared, and must share with the other creditors in case insolvency afterward occurs before payment (43). The shareholder must, however, demand payment, before the corporation is in default for non-payment;

(40) Looker v. Maynard, 179 U. S. 46.
(41) Williams v. W. U. Tel. Co., 93 N. Y. 162.
(42) Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657.
(43) Hunt v. O'Shea, 69 N. H. 600.

after that, he can sue the company for refusing to pay, either in assumpsit or debt. The power to declare dividends resides in the directors, and, so long as they act in good faith in furthering the interests of the company according to their judgment, a court will not control their discretion in compelling the declaration and payment of a dividend; but, where they fraudulently withhold payment out of funds available, the court may order a distribution (44). And where preferred shareholders are entitled to receive their dividends annually, out of the profits earned during any one year, which are non-cumulative, a court of equity will order a dividend to be made, when there are net earnings properly divisible (45).

§ 206. **Who are entitled to dividends?** This of course is a matter of contract between the transferrer and the transferee; but, in the absence of any stipulation to the contrary, the owner of the shares at the time the dividends are *declared* is entitled to them, and it makes no difference when they were earned or when they are to be paid. As between the pledgor and the pledgee of shares, the latter is entitled to the dividends paid during the existence of the pledge, to be credited on his claim against the pledgor If A is the owner of shares when a dividend is declared, it belongs to him, though it does not become due until after A has transferred his shares to B. So, too, if A sells to B before a dividend is declared, it of right belongs to B, though it is declared before the transfer on the books is made to B; in this case, however, the corpora-

(44) Crichton v. Webb Press Co., 113 La. 167.
(45) Hazeltine v. Railroad Co., 79 Me. 411.

tion will be justified in paying A, if it has no knowledge of B's claim; and generally the corporation is protected if it in good faith pays to the registered owner. As between successive owners of shares, the rules given in the previous subsection relating to setting aside the dividend fund do not apply. The *declaration,* not the setting aside, is the important point.

Thus, where preferred stock was guaranteed a ten per cent dividend before the common stock, and no dividends were paid between 1857 and 1863, but afterwards such dividends were paid regularly and a large surplus accumulated; in 1870, P acquired 40 shares of preferred stock, and, in 1880, the corporation proposed to declare dividends out of the surplus on the common stock; P claimed that he was entitled to the dividends that should have been declared and paid in 1857-1863, and the court so held; since they were not then *declared,* the right to them passed to the successive owners of the stock until declared (47). B on April 1 agreed to sell shares to L on or before July 18, to be paid for on delivery, nothing being said about any dividends; July 3 a dividend was declared, payable August 1; L exercised his option July 16, and paid for the stock. Held, B was entitled to the dividend as he was the owner of the shares at the time it was declared (48).

§ 207. **Between life tenant and remainder man.** The cases are in conflict as to this; one rule is, that if the dividend is a money dividend, it is always to be paid to the life tenant as income; but, if it is a stock dividend, it is all

(47) Jermain v. L. S. & M. S. Ry., 91 N. Y. 484.
(48) Bright v. Lord, 51 Ind. 272.

to be paid to the remainder man as a part of the estate. Another rule is that if the dividend is ordinary; i. e., one arising from the ordinary operations of the company, it will all go to the life tenant; but, if extraordinary, such as declared out of capital when the stock is lawfully reduced, all of it should be paid to the remainder man. Another rule is that the intention of the corporation shall govern —what it declares to be earnings shall be treated as income and go to the life tenant; and what it considers capital shall be so considered and go to the remainder man. Another rule, and the one having the weight of authority, is that the courts will investigate when the fund was earned; if earned before the death of the person creating the tenancies for life and in remainder, it will go to the remainder man, as a part of the corpus of the estate; if in fact it represents earnings accumulated afterward, it will go to the life tenant, whether paid in money or stock (49).

§ 208. **Transfer of shares. Right to transfer.** The general method of transfer has been described. The certificate of stock usually says, "transferable in person or by attorney on the books of the corporation upon the surrender of this certificate." On the back, a blank form of assignment is usually present, reading, "For value received I hereby sell, assign, and transfer to ——————— all my interest in ——————— shares of stock represented by this certificate and I hereby irrevocably appoint ——————— my attorney to transfer the same on

(49) McLouth v. Hunt, 154 N. Y. 179. See note, 118 Am. St. R. 162.

the books of the corporation, with full power of substitution;'' when this is signed by the owner, the certificate will pass by delivery without filling in the other blanks, and any subsequent holder can fill in the blanks and have his name put on the corporate books as owner, and get a new certificate in his own name to that effect (50). It has been said that writing is essential to the transfer of shares, since they are mere choses in action; but, while a written assignment is the universal custom, in the absence of special provision so requiring it is not necessary by the weight of authority. The right to transfer is an incident of the ownership of the property in the shares—and the corporation, unless the statute expressly allows, cannot prevent such transfer, although it may regulate it by reasonable provisions for the protection of the corporation (51). But at the time the subscription is made, the subscriber may, in some states, agree to offer his shares to the corporation or other members before selling to outside parties (52). There is no right generally recognized in this country to transfer shares after insolvency, or to an incompetent or insolvent person for the purpose of evading liability.

§ 209. **Registration of transfer.** There are two theories as to the necessity of the registration of the transfer on the books of the corporation; one is that the legal title does not pass by delivery of the certificate duly indorsed and assigned—registration being essential to pass the legal title, and only an equitable title passing without

(50) Keller v. Mfg. Co., 43 Mo. App. 84.

(51) Bloede Co. v. Bloede, 84 Md. 129.

(52) Barrett v. King, 181 Mass. 476.

(54); the other is that, as between the parties themselves and all other parties claiming through them, the whole title passes with the delivery of the certificate duly endorsed, with a power of attorney to have the transfer made on the books of the company (55). This latter is certainly supported by the great weight of authority. As between the corporation and the transferror or transferee, until the registration is made on the books of the company, the corporation may, until it is satisfied of the right of the transferee, recognize the registered owner (56). The above rules are of importance in the case of attaching creditors of the transferror, and give exactly opposite results. As between pledgor and pledgee, registration is unnecessary. But the pledgee, in order to prevent the possibility of loss, usually has the stock registered in his name. Where P indorsed his certificate of shares in blank and delivered it to B his broker to secure a balance of account of $3,000, and B, without authority, pledged the same shares by delivery of the indorsed certificate to a bank, to secure a loan of $8,000 to B, the bank, having no knowledge of the wrongful act of B, could hold the shares as against P, until the $8,000 loan was fully paid (57). But, if instead of claiming to own the shares and borrowing for himself, B had represented he was P's agent and wished to borrow for him, and had pledged the indorsed shares to the bank as security, and, after securing the money, appropriated it himself, P could recover

(54) Perkins v. Lyons, 111 Ia. 192.
(55) Westminster, etc. Bank v. Electric Works, 73 N. H. 465.
(56) People's Bank v. Exchange Bk., 116 Ga. 820.
(57) McNeil v. Tenth Natl. Bk., 46 N. Y. 325.

the shares and the bank would lose, since it relied on B's false representation of agency (58).

§ 210. **Transfer upon forged power of attorney.** Since certificates of shares are not negotiable, this has no legal effect upon the rights of the original owner—he cannot be deprived of his property by the forgery, unless he is chargeable with negligence (59). If the corporation accepts and cancels a forged certificate, and issues a new one in its place, a bona-fide purchaser of the new certificate is protected, and, as against the corporation, may claim membership, unless the corporation has issued all the shares it can; but, if the corporation has issued all the shares it has a right to issue, the purchaser has an action for damages against the corporation. The certificate is a continuing representation of the validity of the shares, when made to an innocent party; the original owner can claim the rights of membership; the forger or the person who induces the corporation to act is liable to it for any loss it sustains. The same rules apply to lost certificates not due to the fault of the owner. Thus, where a certificate was issued to D and by him sold and indorsed in blank to P, from whom it was stolen without his fault by an unknown person, who transferred it to brokers who sold it to M, P can recover the shares and M and the brokers must look to the thief (60).

§ 211. **Transfers in breach of trust.** When A holds shares in trust for B, and there is nothing in the certificates or on the register to show that a trust exists, a bona

(58) Merchants' Bk. v. Livingston, 74 N. Y. 223.

(59) Telegraph Co. v. Davenport, 97 U. S. 369.

(60) East Birmingham Land Co. v. Dennis, 85 Ala. 565.

fide purchaser from A gets a good title as against B, and B must look to A. If the certificate or register shows a trust exists, the purchaser takes it subject to the trust (61); if the corporation has knowledge of the existence of the trust and of any limit on the power of the trustee to transfer, and it negligently allows him to transfer contrary to his authority, the corporation is liable to the party injured (62).

§ **212. Gift.** A gift of shares may be made by delivery of the certificate for that purpose, without indorsement. Registration is not essential to the validity of the gift, though perhaps the full legal title is not complete, until indorsement on the certificate or transfer is made on the corporate books (63).

§ **213. Effect of transfer.** The general rule is that the transferror is no longer a member, and is no longer in any way liable to the corporation or its creditors, even though the shares are not fully paid; the purchaser, on the other hand, assumes, if he has knowledge of the facts, all the obligations and is entitled to all the rights of the seller (64). If he has no knowledge that the shares were not paid up, in the absence of any statute to the contrary, he is not liable to the corporation or to its creditors—he has a right to presume they are paid up, though the certificate does not so state, and he is not obliged to inquire into the matter (65). In such case it would seem the transferror

(61) Winter v. Gas Light Co., 89 Ala. 544.

(62) Loring v. Salisbury Mills, 125 Mass. 138.

(63) First Natl. Bk. v. Holland, 99 Va. 495.

(64) Visalia, etc. R. R. Co. v. Hyde, 110 Cal. 632.

(65) West Nashville, etc. Co. v. Nashville, etc. Bank, 86 Tenn. 252.

would remain liable to the corporation, at least so far as necessary to protect creditors. The matter is regulated by statutes in many states.

§ 214. **Remedy for refusal to transfer.** This is an action to recover the value of the shares, as damages—usually at the time of refusal, but, by some decisions, the value at the time of trial or the highest value at any time between the refusal and the trial (66); under some circumstances, where shares cannot be obtained, a court of equity, or a court of law by mandamus, will compel a transfer (67). The reason why the courts will not ordinarily compel a transfer is because there is no necessity of possessing the identical shares; by recovering the market value of them, they can usually be replaced.

§ 215. **Right to inspect books.** At common law a shareholder had the right to inspect the corporate books, whenever there was a real matter of controversy between him and the corporation, or its officers, or shareholders, which made it necessary to see the books; now, by statute generally, he has the right at reasonable times to see the books and take copies of the entries by himself or his agent, without there being an actual controversy existing; it must be exercised at a reasonable time; if refused, an action for damages will lie, or the custodian may be compelled by mandamus to permit inspection. Recently, even without statute, the courts have applied a much more liberal rule than formerly. Thus where a shareholder was simply "desirous of learning the true condi-

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(66) Burdick, Torts, p. 205.

(67) Cushman v. Thayer, etc. Co., 76 N. Y. 365.

tion of the affairs of the company and the value of his interest therein,'' the corporation was compelled to allow the inspection; the reason being that the shareholders are in substance part owners of the corporate property (68).

§ 216. **Right to share in increase of stock.** Where the corporation has the right to increase its capital stock, each shareholder has a right to subscribe at par for such proportion of the new stock as his holdings are of the old stock, in preference to outside parties. Thus, where the corporation voted to increase its stock and offer it to shareholders at twenty-five per cent premium, in proportion to their holdings, and, if it was not taken by a certain date, to sell it to new stockholders; and the plaintiff offered to take his proportion at par, tendered the money, and was refused; he was entitled to a mandamus to compel the company to issue him his proportion of the new stock. The reason is that the shareholders are really the owners of the corporate concern, and any other rule might diminish the value of each share of old stock by letting in other parties to an equal interest in the surplus and good will of an established business (69).

§ 217. **Right to sue for wrong done the corporation.** The general rule is that shareholders have no such right, the corporation being the proper party—but in some cases there would be a failure of justice if they were not allowed to sue. Whenever the corporation is *unable* to sue for a wrong done it, then a bona fide shareholder may, upon behalf of himself and all others, sue to have the

(68) State v. Pacific Brewing Co., 21 Wash. 451.
(69) Hammond v. Edison Illuminating Co., 131 Mich. 79.

wrong righted. The wrongs for which suit may be brought are the ultra vires acts of the agents, resulting in damages to the corporation; the fraudulent acts of the directors, or their acting in their own instead of the corporate interest; and oppressive or fraudulent acts of a majority of the stockholders. The plaintiff must allege and show that he tried to have corporate action taken through the proper corporate agencies to have the wrong righted, and that they refused, or that the wrongdoers were the corporate officers themselves who had authority to have the corporation sue. If the offense charged is one that the shareholders could ratify, the courts will not interfere until they have been called to pass upon the matter, unless delay would be perilous if a right existed (70).

SECTION 4. CREDITORS OF THE CORPORATION.

§ 218. **Creditors and the state.** As a general rule, the state, unless it has reserved the power to repeal or amend a charter cannot repeal or change the statutory *contractual* liability of shareholders, so as to impair the security of existing creditors; but the *penal* liability of shareholders may be repealed or changed, and, if the state has reserved the power to repeal, the contractual liability may be changed. Dissolution by the state does not affect creditors' rights; they are enforceable against the assets of the corporation. Remedies may be modified, provided they are not substantially taken away. Contractual and penal liabilities are defined below.

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(70) Hawes v. Oakland, 104 U. S. 450.

§ 219. **Creditors and the corporation.** Creditors have all the ordinary rights to enforce their claims against the corporation in the usual way in courts, that they would have against individuals; except that such property as is necessary for the corporation to perform some public duty cannot be taken on execution; but the income from it may be sequestrated in equity or otherwise to pay the claims (71). Creditors have no right to interfere with or dictate the manner in which the corporation is managed (72). The reason for this is that they have no interest in the matter, other than to be paid what is due them when it is due.

§ 220. **Preference of creditors.** The corporation, by the great weight of authority, has the same right to prefer a creditor in case of insolvency that an individual has; where this rule applies, a bona fide shareholding creditor or a director-creditor can be preferred also (73). In some of the states it is held that, as soon as insolvency occurs, the assets of the corporation become a trust fund for distribution among all the creditors in proportion to their claims, and the corporation can give no preferences (74).

§ 221. **Assets as a trust fund** (75). The general doctrine is that the capital of a corporation is a fund set apart for the protection of creditors, and cannot be given away or distributed among shareholders, until creditors are fully paid; that there is included in this fund not only

(71) Louisville, etc. Ry. v. Boney, 117 Ind. 511.

(72) Pond v. Framingham, etc. Co., 130 Mass. 194.

(73) Corey v. Wadsworth, 118 Ala. 488.

(74) Rouse v. Merchants' Bank, 46 O. St. 493.

(75) Wood v. Dummer, 3 Mason 308; Hospes v. Car Co., 48 Minn 174.

any property the corporation has, but the sums unpaid by the shareholders upon their stock subscriptions, so far as necessary to pay creditors who have relied thereon; also all claims due to the corporation from whatever source can, in some form of proceeding, be recovered and applied to the payment of creditors' claims; also all capital of the company distributed to the shareholders, that has the effect of reducing the property below the amount of capital stock that the corporation is to have, can be recovered so far as necessary to pay creditors who have relied thereon before extending credit, and provided the shareholders did not innocently receive it. A creditor, who becomes such before an increase of stock is made, cannot complain of its non-payment—for he does not rely on it; so a subsequent creditor can not complain of a previous improper disposition of the corporate property, if he did not extend credit in reliance upon the corporation still having such property.

§ 222. **Right of creditor to prevent dissipation of funds.** As has been stated, the creditors have no right to interfere in the corporate management; but the cases have generally recognized the right of creditors to enjoin threatened wrongs which would destroy the creditors' security, or enjoin waste of the corporate funds, or have conveyances in fraud of their rights set aside. In such cases the creditor must first establish his claim by a judgment at law, or in some other way obtain a lien upon the corporate assets, before a court of equity will give him such relief, and he must usually sue in such form as will

allow other creditors to join him, and have the assets administered for the benefit of all (76).

§ 223. **Creditors and officers.** So long as officers keep within their authority, they do not make themselves liable to creditors upon contracts they make for the company; if they exceed their authority, they become liable to those with whom they contract; if they commit a tort while acting for the company, they are liable therefor to the person injured, although the corporation may be also; the directors may be liable for tort for permitting such management of the corporation as creates a nuisance; under some circumstances, if they are negligent in managing the corporate affairs so the corporation would have an action for damages against them, upon insolvency, such a claim for damages is an asset which the creditors have a right to have enforced against the officers, if necessary to pay their claims.

§ 224. **Statutory liability of officers.** In some of the states where officers fail to make certain reports, or make false ones, or incur debts in excess of a certain amount, they are made liable for the debts of the corporation; in such cases the statutory method of recovery, if any is fixed, must be followed; but courts will allow recovery in some of the ordinary forms of proceeding, if no special form is provided.

§ 225. **Creditors and shareholders.** Creditors have no rights against shareholders, in the absence of a special statutory liability, provided the corporation is de jure

(76) Hollins v. Brierfield Coal Co., 150 U. S. 371.

the face value of the stock has been fully paid in, and there has been no distribution of the capital stock before creditors are paid. The liability of shareholders arises in one of two ways: (1) From the common law; and, (2) under special statutes. The common law liability arises principally under three circumstances: (a) Imperfect organization; (b) failure to pay in the full amount subscribed; (c) payment of dividends out of capital instead of profits.

§ 226. Common law liabilities of shareholders to creditors. The first of these, arising out of imperfect organization, is based upon the rule that, when a number of persons undertake a business transaction and fail to become incorporated, the common law partnership liability results; as we have seen, if the corporation is de facto, the weight of authority holds that there is no other than the corporate liability, and not the partnership; and so too, where there is an estoppel against a particular creditor, he cannot hold the members to an individual partnership liability.

Second, since the capital stock is a fund for the protection of the creditors, it is in the nature of a fraud for the corporation or its shareholders to claim to have a capital stock up to a certain amount, which it has never received; the courts say that, for the protection of creditors and when necessary for the payment of those relying upon it, the shareholders will be required to make this representation good by making payment—this is what is usually

meant by saying that such subscriptions are a trust fund for the creditors' security (77).

In the third place, if the shareholders divide the corporate assets among themselves, before paying the creditors, the result is the same as if the capital had never been paid, and creditors who became such before the division have a right to have the sum so distributed paid back, so far as necessary to pay their claims. But shareholders who have innocently received dividends paid out of capital instead of profits, before insolvency, will not be required to refund (78).

§ 227. **Same: Procedure.** In these last two cases the creditor's rights arise only after he has established his claim by judgment against the corporation, has taken out execution against the corporate property, and has had it returned unsatisfied or partly so. Then he has the right to sue the shareholders in equity to have the sums due the corporation paid in to discharge his claims; he must usually bring a creditor's bill in such a way that the other creditors can come in and share in the proceeds in proportion to their claims (79). Judgment against the corporation is conclusive as to the debt of the corporation, and an assessment against the shareholders by the court cannot be questioned by the shareholder; but he can contest his liability on the ground that he is not a member, or that the judgment was fraudulently obtained. A receiver is usually appointed by the court, who can sue,

(77) Hospes v. Car Co., 48 Minn. 174.

(78) Davenport v. Lines, 72 Conn. 118; McDonald v. Williams, 174 U. S. 397.

(79) Lawrence v. Greenup, 97 Fed. 906.

by himself or by an ancillary receiver, any shareholder who owes the corporation, in any state to recover the amount so due; the liability of the shareholders is several, but it is usual in the suit to join all, though some are out of the jurisdiction of the court (80).

§ 228. **Non-payment of shares.** Under (b) in § 225, above, difficult questions arise as to the liability of shareholders who have an agreement with the corporation by which they are not to pay in full for their shares. Such agreements are valid as between the corporation and the shareholders, but are generally invalid as against creditors, so the creditor can require full payment for his protection.

There are four exceptions: (1) When the shareholder has *purchased* from another shareholder, in good faith, shares that were not in fact fully paid but which he supposed were, he is not liable to creditors for the unpaid amount. (2) When the corporation is in failing circumstances, but has the power to increase its stock, and it does this under stress of circumstances and in good faith to re-establish itself, it may sell such stock at its market value, or issue it as a bonus along with bonds issued, to tide over its difficulties; and those who take the stock or bonds or both, in good faith at their market value then, will not be held to any further liability in favor of subsequent creditors (81). (3) It is held in New York and Illinois that a corporation like a railroad company may issue its shares below par, or at their market value, in

(80) Stoddard v. Lum, 159 N. Y. 265.
(81) Handley v. Stutz, 139 U. S. 417.

payment of a construction company for the construction of its road, and such company is not liable to subsequent creditors for the difference between the face value of the shares, and the price at which they were taken (82). (4) In case shares are paid for in property, it is generally held that, so long as there is no actual fraud in valuing the property, whatever price it is taken at, even if it is an over-valuation, shall be final and creditors cannot complain; other states, notably Missouri, hold that any over-valuation, though made in good faith, must be paid back to the company by the person receiving the shares upon that basis, if necessary to pay creditors who have relied on the company having the capital it pretends to have. Many cases also hold that an excessive over-valuation is prima facie fraudulent, and the discrepancy will be required to be satisfactorily explained, or made up (83). Perhaps *good will* is property with which shares can be paid, if it really exists in the particular case; labor, services, patents, franchises, etc., are property within the rule.

§ 229. **Statutory liability of shareholders to creditors.** This is a liability placed upon shareholders, over and above their common law liability, for the protection of creditors; it is not generally a part of the corporate funds for the purposes of carrying on its business, but it is a security for creditors alone; as to its legal character, it is either (1) contractual, or (2) penal. The contractual may be either (a) a joint and several, unlimited, primary

(82) Van Cott v. Van Brunt, 82 N. Y. 535.
(83) State Trust Co. v. Turner, 111 Ia. 664.

liability; (b) a joint and several, unlimited, secondary liability; or, (c) a limited, primary or secondary liability. If *primary,* the liability arises at the time the liability of the corporation does; if *secondary,* only after the corporation is unable to pay; if *unlimited,* it is substantially that of a partner; if *limited,* then it extends only to the limit, which is usually a sum equal to the amount of the subscription in addition thereto, or such a proportion of the debts as the shareholder's shares are of the total shares. If it is primary, the statute of limitations would run at the same time it does against the corporation. If secondary, only after it was established that the corporation could not pay. It may be provided in constitutional or statutory provisions; if it is provided in constitutions, it will be self-executing whenever it is fixed in amount, and no special machinery for its enforcement is necessary.

§ 230. **Contractual and penal liabilities.** A penalty is a punishment for doing something that is forbidden, and is to be recovered by the state; it can be changed or modified at any time, and it is not enforcible outside of the state; some of the statutory liabilities are similar in form to penalties, but, if they are designed for the protection of creditors in such a way that the offender becomes a debtor to the creditor by his failure, they will be considered contractual in nature, so as to allow suits to be brought in other states for their enforcement in favor of the creditor. If the liability is contractual, subsequent creditors have a vested right in it for their protection, such as cannot be taken away from them without their consent; such a liability also survives and attaches to the

estate of a deceased shareholder, and may be enforced against it, or the representative of a deceased creditor can enforce it against shareholders (84). If a true penalty, such rules do not apply.

§ 231. **Enforcement in other jurisdictions.** If a special remedy is provided in the state creating the statutory liability, of such a nature that the right cannot be separated from its accompanying procedure, and this is different from the procedure in the state where it is sought to be enforced, it will not be there enforced (85); but, if no special remedy is provided, or if it is of a kind that can be enforced in a foreign jurisdiction according to the ordinary procedure there, it will be enforced there. The usual method is through a creditor's bill or receiver, as described above (§ 227) in connection with the common law liability (86). The same rules also apply as to the effect of judgments. The true penal laws of one state, however, are not enforced by the courts of another state (87).

(84) Huntington v. Attrill, 146 U. S. 657.
(85) Marshall v. Sherman, 148 N. Y. 9.
(86) Howarth v. Angle, 162 N. Y. 179.
(87) Wisconsin v. Pelican Ins. Co., 127 U. S. 265.

PUBLIC SERVICE CORPORATIONS AND CARRIERS.

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PART I.

PUBLIC SERVICE CORPORATIONS.

CHAPTER I.

INTRODUCTION.

§ 1. **No law of public service companies as such.** The development of our modern industrial organization has made the so-called public service companies or corporations agencies of vast social and economic importance. As corporations, they are of course subject to the general law applicable to all corporations; but their close contact

with society at so many points has been a prolific source of legislation and litigation, involving matters not common to other corporations. The result is a body of law especially applicable to public service companies. Of necessity much of this law has to do with matters peculiar to particular classes of public service companies: rules relating to the carriage of goods need have no relation to the business of a gas company; statutes governing the distribution of water for irrigating purposes are obviously inapplicable to the conduct of a telephone company. On the other hand, we find, within the body of the common law, a few fundamental and far-reaching principles applicable to all public service companies. But these principles are not confined in their operation to corporations. As principles they were recognized when public service companies were unknown, and they extend to all persons, whether natural or artificial, who are engaged in the business of supplying those services which the law calls public. They constitute a body of law which is, more accurately speaking, the law of public service, or, perhaps better still, the law of public callings. No part of this law presupposes a corporation or even a group of individuals (1). The village innkeeper, expressman, and ferryman are all governed by this law as fully as the great hotel, railway, and navigation companies.

§ 2. **Public control of business affected with a public interest.** In a large sense, society has an interest in every form of business that is carried on by its various members; but it is only in certain kinds of business that we

(1) Chesapeake & Pot. Tel. Co. v. Bal. & Ohio Tel. Co., 66 Md. 399.

find a direct public interest which is recognized as such by the law. This interest may be recognized by the legislature or by the common law. Recognition of such an interest by the legislature may appear in a law extending state aid to a particular enterprise; it may also be seen in a statute conferring upon a class of corporations the right of eminent domain; it is often manifested in laws regulating the rates which may be charged the public for designated services. If the constitutionality of such a law is questioned in the courts, the question arises: is the business to which it is applicable affected with a public interest? The state cannot aid an enterprise of a purely private character (2); it cannot extend the power of eminent domain to a corporation whose business does not serve a public purpose (3); it cannot say at what price a man must sell his services, unless his business is affected with a public interest (4). When such a question is raised the court will find the public interest present unless it is very clearly absent; for it must act upon the presumption that every statute is constitutional until the contrary very clearly appears (5). But the question of public interest may come before the court in a very different way. A plaintiff may complain that the defendant has refused to render him a particular service, although he has tendered the defendant a reasonable compensation therefor; or he may charge that the defendant has unreasonably discriminated against him in favor of

(2) Mich. Sugar Co. v. Auditor General, 124 Mich. 674.
(3) Richards v. Wolf, 82 Iowa, 358.
(4) Munn v. Illinois, 94 U. S. 113.
(5) Munn v. Illinois, 94 U. S. 113.

others, with respect to such a service. In such case the question comes before the court: is the rendition of this service affected with a public interest; or, in a somewhat different form, is the defendant engaged in the performance of such services as a public calling? Unless this question be answered in the affirmative, the plaintiff must fail. The man engaged in a purely private business may serve whom he will, at what price he will, under what conditions he will. If his terms are not met, he may remain idle; and the applicant has no legal ground of complaint, however great the hardship. If, however, the defendant performs such services as a public calling, the common law, quite apart from all statutes, requires him to serve all who make proper application and permits no unjust discrimination (6). The private calling is the rule; the public calling is the exception; accordingly, when the court is in doubt as to whether a particular business is public or private, within the view of the common law and quite apart from all questions of constitutionality of statutes, the presumption, and, consequently, the decision, will be that the business is private.

§ 3. **Article limited to common law of public callings.** We have seen that the question of public interest in a particular business may come before the court, either when the primary question is as to the constitutionality of a statute, or when the inquiry is as to the applicability of the common law of public callings. We have also seen that, in the first case, the presumption is that the public interest is present; whereas, in the second case, the pre-

(6) State v. Nebraska Tel. Co., 17 Neb. 126.

sumption is that it is absent. From this it logically follows that a cautious court might consistently hold, with reference to a particular business, that it might be controlled by the legislature as one affected with a public interest, and yet refuse to recognize it as a business affected with that public interest which brings it within the common law applicable to public callings (7). And, although there could scarcely be a doubt of the legislature's right to control a business recognized as public at common law, it is obvious that it will be unsafe to conclude that, because a court upholds a statute which treats a particular business as public, the same court would also treat the same business as a public calling at common law. The matter of statutory regulation is primarily a question of constitutional law, and the cases relating thereto are primarily decisive of constitutional questions; so this article will be confined to the limits of the common law, relying, as far as possible, upon common law cases.

(7) Ladd v. Cotton Press Co., 53 Tex. 172.

CHAPTER II.

NATURE OF PUBLIC CALLING.

§ 4. **Early recognition of public callings as such.** That the common law recognizes a vital distinction between those businesses which are private, and those which are in a legal sense public, has already been pointed out: in the former there is freedom; in the latter there is control. The man whose occupation is private may deal with whom he chooses, under such conditions as he cares to impose; the man whose business is public must deal with everyone, under such conditions as the law imposes for the public good. With the multiplication of industries, this distinction has become more and more important; but it was well-defined very early in the development of the common law. From a case decided in 1441 it appears that a horse doctor was at that time subject to special liability by reason of his public profession (1). In 1450 it was agreed by the king's bench that "where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case" (2). In the reign of Edward IV it appears that a tailor was bound to serve all (3). In 1683 an action was

(1) Anonymous, Y. B. 19 H. VI, 49, pl. 5.
(2) Anonymous, Keilway, 50, pl. 4.
(3) Y. B. 22 Ed. IV, 49 pl. 15.

brought against a common carrier for refusing to carry a pack of goods, though offered his hire and having conveyances to carry them. "And held by Jeffries, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same" (4). Changed conditions have worked a silent transfer of the occupations of the tailor, smith, and surgeon to the list of private callings (5); but the common carrier and innkeeper remain as the most familiar of all our public servants.

§ 5. **Modern additions to the public callings.** In the great case of Munn v. Illinois (6) the United States Supreme Court clearly recognized the distinct legal status of public employments, as such, in these oft-quoted words: "When one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." The case involved a question of constitutional law not here important to consider, but the court relied in part upon common law cases and treated the principle as one of general application. It would be unsafe to attempt a complete enumeration of all employments which the courts have heretofore decided to be affected with a public interest; if a list were completed for today it might not be complete for tomorrow,

(4) Jackson v. Rogers, 2 Shower, 327.
(5) Beale & Wyman, Railroad Rate Regulation, § 16.
(6) 94 U. S. 113.

so rapidly has it grown in recent years; but the mere naming of some of the most important of them cannot fail to make clear the practical importance of this branch of the law. For various reasons and under varying conditions the courts have held that individual hotel, railroad, express, toll-road, toll-bridge, ferry, telegraph, telephone, electric, gas, water, irrigation, sewerage, stock-yards, warehouse, and log-driving companies were each engaged in a public occupation, and therefore bound to serve the public at reasonable rates and without unjust discrimination (7).

§ 6. **When is a business affected with a public interest?** The decisions, in which the companies above enumerated have been held to be engaged in public business, show that various considerations have influenced the courts in arriving at their conclusions in different cases. In one case a particular fact is chiefly relied upon; in another a very different fact is regarded as equally decisive; but usually the decision is based upon a combination of circumstances, and, it is needless to add, no two combinations are exactly alike. All this is natural and inevitable, for the cases differ greatly in their facts, and each case must be decided upon its own facts. However, an examination of the cases discloses certain considerations which appear to have had an important bearing upon the decision of many cases; taken together they may be said to constitute the more common avenues of approaching the

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(7) See cases collected in Beale & Wyman, Cases on Public Service Companies.

final conclusion. These lines of approach will now be considered.

§ 7. **Effect of precedent.** Always loyal to established principles, and always deferential to precedent, the courts do not require a reason for holding that the traditional public employments are affected with a public interest (8). They accept without question the legal status of the common carrier and innkeeper as one of the elementary principles of the law. Whatever may have led the early courts to the first recognition of this status, its maintenance is now secured by loyalty to established precedent.

§ 8. **Effect of analogy.** Closely related to precedent is analogy. In many cases the courts rely very largely upon the mere likeness of the business in question to some other recognized public employment. When the analogy is clear, the business is treated as public without a very close inquiry into fundamental principles, and often as though its public character were already a matter of precedent. If he who carries goods by a train of pack-animals for all persons indifferently is a common carrier, it follows naturally that the railway and express companies who carry goods for all persons indifferently by a train of cars are likewise deemed common carriers. If the common carrier of goods is engaged in a public occupation, it is natural to suppose that the telegraph company, a public carrier of messages, is also engaged in a public occupation. Other analogies will readily occur. The judicial use of analogy in solving the problem

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(8) Tiedeman, Limitations of Police Power, § 92.

whether a particular business is public or private is well shown by the following extract from a leading case (9) involving the question whether a telephone company is bound to serve all: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and, in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

§ 9. **Effect of legal monopoly.** Sometimes, considerations of public convenience justify the legislature in granting a legal monopoly in some forms of business. When this has been done, the reciprocal obligation of the beneficiary of the grant to serve the public would seem to follow as a necessary conclusion. Such an obligation was recognized by the king's bench in the case of Allnutt v. Inglis (10) decided in 1810. It appeared that the London Dock Company enjoyed, by virtue of an act of Parliament, a monopoly of the privilege of warehousing certain wines in the port of London. The question was, whether

(9) State v. Neb. Tel. Co., 17 Neb. 126.
(10) 12 East, 527.

the company might charge whatever it pleased for warehousing such wines, or was bound by law to render the service for a reasonable compensation. The court held that the company was restricted to a reasonable charge. In a great opinion, Lord Ellenborough thus set forth the nature of legal monopoly and its accompanying obligation to the public: "And there are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London Dock premises, or such others as are within the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon monopoly; but, at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction; and it is enough that there exists in the place and for the commodity in question a virtual

monopoly of the warehousing for this purpose, on which the principle of law attaches.''

§ 10. **Effect of special privilege.** Just as the convenience of the public sometimes warrants the legislature in conferring an out and out monopoly, the public welfare is also sometimes served by the bestowal of a special legal privilege. Public convenience, almost amounting to public necessity, warrants a municipality in granting to a street-car company the privilege of a more or less permanent occupation of a portion of the streets by its ties, tracks, wires, and poles. For a similar reason, water, gas, telephone, and electric companies enjoy a similar privilege. Railways are likewise of supreme importance to the public; but railways cannot be built without the enjoyment of rights of way. To secure rights of way, resort must often be had to condemnation proceedings. Hence the railway company is granted the privilege of eminent domain. Similar considerations result in the exercise of this privilege also by water, gas, telegraph, telephone, and other public service companies. In the nature of the case, the land that is available for permanent occupation by those companies which must use the streets, or by those corporations like railway and water companies which must have a practicable and economic line of conveyance between more or less distant points, is very much limited in extent. The result is that it is practically impossible for more than a very few companies of this character to carry on the same kind of business, at the same time, in the same locality. How many street-car companies may have their tracks in the

same street? Necessarily, then, the grant of these special privileges in the streets, or of the privilege of eminent domain, often amounts in its practical effect to the creation of a legal monopoly. That the enjoyment of a special privilege, tending strongly to create a monopoly, should carry with it a corresponding duty to serve the public follows logically from the principle applied in Allnutt v. Inglis (§9, above). That such an obligation is the legal consequence of the enjoyment of such privileges is well established.

The operation of the principle is well illustrated in an Ohio case (11), in which one of the questions related to the right of a railroad company to the supply of light by an electric light and power company. In affirming the duty of the latter company to provide the service at a reasonable rate the court said: "The light and power company have acquired in the village rights that are in the nature of a monopoly. The use to which it has devoted its property is one in which the public have an interest, and it requires the use of the streets and alleys of the village to conduct and distribute electricity to its lamps for illuminating purposes; and, in addition to this, power to appropriate private property has been conferred on it. Section 3471, Revised Statutes. Both reason and authority deny to a corporation, clothed with such rights and powers, and bearing such relation to the public, the power to arbitrarily fix the price at which it will furnish light to those who desire it."

§ 11. **Effect of mandatory provisions of charter.** Some-

(11) Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Oh. St. 336.

times the charter or franchise, under which a particular corporation does business, contains an express stipulation, under which the retention of charter privileges is expressly conditioned upon the assumption and discharge of certain duties in the nature of public service. It is obvious that in such a case the court need not look beyond the terms of the charter itself in deciding the legal status of the company in question. A mandatory provision of a charter, commanding the performance of public duties, has the same effect. Thus, where the charter of a canal company contained the express provision, "the said corporation shall be obliged to keep the said canal and locks in good and sufficient order, condition, and repair, and at all times free and open to the navigation of boats, rafts, and other water crafts," etc., it was held that lack of funds and inability to operate the canal at a profit was no excuse for a failure of the company to discharge its public duties (12). Said the court: "So long as the corporation retains its franchise, it will not be allowed to urge, as an excuse for failing to perform any duty required of it by its charter, that the same would be unprofitable. It cannot consistently keep the franchise and refuse to perform the duties incident thereto, for the mere reason that such performance would be unremunerative. If the rights, privileges, and franchises granted by the charter are, in connection with the corresponding duties thereby imposed, no longer desirable, the company should simply surrender its charter."

§ 12. **Is there any definite test?** At this point the

(12) Savannah & Ogeechee Canal Co. v. Sherman, 91 Ga. 400.

question arises: Is there any one circumstance, or combination of circumstances, the presence of which shows that the business is affected with a public interest, and the absence of which shows that the business is private in the view of the common law? However desirable the adoption of a definite test might be, it must be confessed that there has been no general recognition among the courts of the existence of such test. As already pointed out, they have sometimes been influenced chiefly by one consideration, and sometimes by another. A recent writer has ably argued that the earliest public employments, like those of the common carrier, smith, and innkeeper, were characterized by public importance and virtual monopoly; that the modern additions to the public callings are characterized by virtual monopoly, or a natural tendency thereto, as well as by public importance; that there is no other common element; and that therefore the decisive circumstance that distinguishes public from private callings is the presence of virtual monopoly in a business of importance to the public (13). It is plain that the general acceptance of this view would result in the treatment of certain great monopolistic corporations as public service companies, subject to control for the common good, and that such acceptance might be highly desirable; but certainly the courts are at present far from agreeing upon such a test. We have already seen that the enjoyment of a legal monopoly, or of a special privilege which tends to create a monopoly, carries with it the reciprocal obligation of public service; but it is obvious that virtual

(13) B. Wyman, in 17 Harvard Law Review, 217, 227.

monopoly, created by the play of economic forces and resulting in no part from legal privilege, raises an entirely different question. The sufficiency of mere monopoly to stamp an important business as public does not seem to have been seriously considered by many courts. Thus, where the Standard Oil Company refused to purchase oil that was shipped through plaintiff's pipe line, the court appeared to regard as self-evident the proposition that the company's right to deal with whom it pleased, on what terms it pleased, was unaffected by its enjoyment of a virtual monopoly (14). The hopeless disagreement of the courts by which the matter has been seriously considered is well illustrated by two cases, each involving the question as to whether the Associated Press is engaged in a public calling.

§ 13. **Same: Conflicting decisions.** In Inter-Ocean Publishing Co. v. Associated Press (15), the defendant had refused its news service to the plaintiff, on the ground that the plaintiff insisted upon obtaining news from a rival of the defendant. The plaintiff, a publisher of two newspapers, claimed that it must obtain news from each of the two news service companies in order to procure all the news which, as a public newspaper, it ought to print. It therefore asked the court of equity to compel the defendant to sell its news to the plaintiff. In deciding for the plaintiff, the supreme court of Illinois, speaking through Mr. Justice Phillips, said in part: "The organization of such a method of gathering information

(14) Transportation Co. v. Standard Oil Co., 50 W. Va. 611.
(15) 184 Ill. 438.

and news from so wide an extent of territory, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where it gathers news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centred in an association of the character of the appellee, because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports of such an association as appellee. For news gathered from all parts of the country, the various newspapers are almost solely dependant on such an association, and, if they are prohibited from publishing it, or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which the corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for

which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them."

In State v. Associated Press (16), a newspaper sought by mandamus proceedings to compel the Associated Press to provide the newspaper with its news reports. The petition was denied. In an elaborate opinion, involving a detailed examination of the leading cases and setting forth the conclusions derived therefrom, the supreme court of Missouri contended that neither public importance, nor virtual monpoly, nor both together, could, without more, affect a business with such a public interest as to subject it to the control of the common law. The court regarded as vital the entire absence of legal monopoly, special privilege, or legislation declaring the business public. With reference to the effect of "virtual monopoly," the court points out that, in Allnutt v. Inglis (§ 9, above) where Lord Ellenborough made use of the expression and introduced it into the law, there was "a clear case of legal monopoly."

§ **14. Same: Conclusion.** In conclusion it may be said that, although the presence of virtual monopoly has sometimes been treated as decisive, and possibly ought always thus to be treated, the courts do not generally regard it so. And the law writers do not agree that virtual monopoly is the explanation of the special status of public callings in the early law. Says Professor Freund in his work on the Police Power: "The obligation of the inn-

(16) 159 Mo. 410.

keeper, the common carrier, and the common farrier, is perhaps most satisfactorily explained as due to the policy of the law to give special protection to strangers and travellers, their entertainment being regarded in early stages of civilization as a semi-public duty" (17). Whatever may have been their original situation with reference to absence of competition, it is certain that the public servants just named are not essentially monopolists nowadays. It is rare that the traveller of today can resort to but one inn. And, although the railroad, our most important carrier, is the typical example of natural monopoly, the vigorous competition of hackmen and expressmen, also carriers and public servants, is a matter of common knowledge. With reference to those forms of business which are regarded by the law as affected with a public interest, we are inclined to adopt the conclusion of the writer above named, viz., "it does not appear that they have one common characteristic which could explain the special public interest" (18).

§ 15. Characteristics of the typical public calling. Looking at the recognized public service companies with particular attention to the forms of business which they carry on, and without regard to the decisions in which they have been held to be public servants, certain elements appear to be common to most of them. First of all, it will be noted that in each case they appear to be conducting a business, which, in one way or another, is of considerable importance to the people as a whole. Then,

(17) Freund, Police Power, § 388.
(18) Idem, § 373.

in a general way, it may be said that these companies, like the public servants of the early law, are in the business of performing *services* as distinguished from selling *goods*. Even in the case of the hotel-keeper, a part of whose business is the supplying of food, and in that of the gas and water companies, which sell gas and water by the cubic foot, the element of service is apparent. The innkeeper serves food at his table, whereas the grocer, who is not in a public calling, sells it at his store. Gas and water are piped to the consumer; he gets neither at a store in bottle or pail. Indeed, this common element of service is generally recognized in the common use of the expression "public service company." Finally, it should be carefully noted that in each case it is a business as a business, e. g., common carriage, irrigation, electric lighting, gas-supply, etc., that is regarded as a public calling. The courts do not recognize certain large establishments, or particularly successful representatives of the business, as engaged in a public employment, unless the business *as such* is public. These elements may fairly be said to be present in every public calling; but their presence does not necessarily render the business public —the maintenance of a theatre is a distinct business, the amusement of the public is surely a matter of public importance, and the amusement provided is by means of service rendered, but the manager of a theatre is not engaged in a public business and may exclude whom he will from his theatre (19). To these common characteristics must be united another element or combination of

(19) Purcell v. Daly, 19 Abb. N. C. (N. Y.) 301.

elements, perhaps legal monopoly, special privilege, customary status, statutory enactment, or peculiar and extraordinary circumstances, before the business will be treated as public and the person engaged therein deemed bound to serve all without unjust discrimination.

CHAPTER III.

OBLIGATIONS OF PUBLIC SERVICE.

SECTION 1. DUTY OF EQUAL SERVICE TO ALL.

§ **16. In general.** The most fundamental obligation of public employment is the duty to serve all. The arbitrary denial of service to any member of the public is inconsistent with the very idea of public service. Any unjustifiable refusal, on the part of a public servant, to discharge a duty owed to an applicant as a member of the public is sufficient ground for a civil action for damages. Thus, where a railroad company, which had designated a certain car in its passenger train for the exclusive use of ladies and their escorts, denied the privileges of this car to a colored woman on account of her color, the company was held liable in damages (1). The court said: "A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle, or for some reason, that the law recognizes as just and equitable and founded in good public policy." Further enforcing the duty of public service, the courts will, in a proper case, issue a writ of mandamus command-

(1) C. & N. W. Ry. v. Williams, 55 Ill. 185.

ing the performance of a public duty on behalf of an aggrieved member of the public.

§ 17. **Same: Illustration.** A leading Nebraska case is in point (2). Owing to a previous controversy with the applicant, a telephone company refused to install one of its instruments in his office. After holding that the defendant was a public service company and that its denial of service to the applicant was under the circumstances purely arbitrary, the court held that this was a proper case for the issuance of a writ of mandamus. In supporting its conclusion the court thus expounded the broad principle of the public servant's duty of equal service to all:

"The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest' it must supply all alike who are like situated, and not discriminate in favor of, nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the

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(2) State v. Nebraska Telephone Co., 17 Neb. 126.

highest material interests of the country, are not confined to the instrumentalities of commerce, nor to the particular kinds of service known or in use, at the time when these principles were enunciated, 'but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, from the railroad to the telegraph and from the telegraph to the telephone'; as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times, and under all circumstances."

§ 18. **Duty may be owed to members of class only.** Although it is true that an arbitrary refusal of equal service to an individual is inconsistent with the general duty of public service, it is also true that an habitual restriction of service to a particular class of persons may be entirely compatible with a faithful discharge of that duty. The situation of a class may be such as to affect the service of this class with a public interest, although the public may have no interest in the rendition of the same service to other classes. Paradoxical as this may seem, its truth will be evident upon slight consideration. A gas company obtains a franchise from a city and begins to supply its inhabitants with gas. The public interest is manifest; but how far does it extend? It clearly does not extend to the inhabitants of neighboring cities or of the surrounding country; it is restricted to the service of

that class of the public which is found within the city limits; furthermore it does not necessarily extend to all the members of this class, for the duty may be owed only to those inhabitants of the city who own or occupy property reasonably near the company's gas mains. Again a warehouseman may be a public servant; but his duty is obviously limited to those members of the public who have goods to store. A log-driving company may, under some circumstances, be a public service company; but its duties are in that case clearly restricted to those few members of the public who have logs to drive on the stream upon which the company's operations are conducted. The public carrier of passengers is a typical public servant; but his duty is owed to passengers and not to those who may desire to ride in his vehicles for the transaction of business thereon (3).

§ 19. **Same: Illustration.** That a public duty may be owed to members of a class only is a principle that is well illustrated by those cases which hold that an innkeeper's duty is owed to travellers only. Thus in an old case we are told that the indictment against an innkeeper for turning away one who was taken ill was quashed "for not saying he was a traveller" (4). In Lamond v. The Gordon Hotels, Limited (5), we find a modern case which applies and defends the rule. It appeared that the plaintiff went to the defendant's hotel with the intention of staying there. She was received,

(3) Teucks v. Coleman, 2 Sumner, 221.
(4) King v. Luellin, 12 Mod. 445.
(5) [1897] 1 Q. B. 541.

assigned rooms, and treated as a guest. She stayed there for a period of ten months, at the end of which time she was asked by the management to leave the hotel. She refused to go. Thereafter, upon her temporary absence from the hotel, her baggage and personal effects were removed from her rooms, and, upon her return, she was denied accommodations. For this refusal she brought her action. All the judges agreed that, as the defendant's duty was owed to travellers only, the action could not be maintained, unless the plaintiff, at the time she was denied admittance, was in legal contemplation a traveller. And they were unanimous in holding that at that time she had ceased to be a traveller. Said Chitty, L. J.: "It may be a difficult question to determine in any case when the character of a traveller ceases and that of lodger or boarder begins; but, in this present case, I think the judge was entitled on the evidence to come to the conclusion at which he arrived, that the plaintiff had ceased to be a traveller. The custom of England does not extend to persons who are in an inn as lodgers or boarders, and the length of time that a guest has stayed is a material ingredient in determining such a question as was before the judge. If the character of a traveller is continuous, it would follow that the plaintiff would have a right to reside at the hotel all her life, provided she conformed to the regulations and paid her bills, but she could leave at any moment, while the landlord would be bound to provide lodging, without any power to give notice to her to leave. This is a startling proposition, and, as it is moreover unsupported by authority, I cannot assent to it."

§ 20. **Excuses for refusing service in particular instances.** Not only may the duty of a public servant be restricted to the service of a particular class of persons; but the duty to serve members of that class may depend upon their observance of certain conditions, a failure to comply with which on the part of any applicant will constitute a valid excuse for denying his application. Thus, it is plain that if the purpose of the applicant be to commit an illegal act, no public servant can be under a duty to further that purpose. Accordingly it has been held that a telegraph company may and indeed ought to refuse to transmit a defamatory message (6). On the same principle it has been decided that a telephone company may refuse to install a telephone in a house of ill-fame (7). It is no less clear that, if the applicant is in such a condition that compliance with his request would cause discomfort or inconvenience to the public, his application may be denied with impunity. Accordingly a passenger-carrier may and should refuse to carry drunken and disorderly persons (8); and an innkeeper may eject a guest who creates a disturbance in his inn to the annoyance of his other guests (9). For a similar reason he may also send away a guest who contracts a contagious disease, and thereby renders his stay in the inn a menace to the health of others (10). But the interests of the public are not alone to be considered. It is in denying service in

(6) Peterson v. W. U. Tel. Co., 65 Minn. 18.
(7) Godwin v. Telephone Co., 136 N. C. 258.
(8) United Rys. Co. v. State, 93 Md. 619.
(9) Howell v. Jackson, 6 Car. & P. 723.
(10) Gilbert v. Hoffman, 66 Iowa, 205.

individual instances that the public servant most frequently asserts his law-given rights. We shall later see that one engaged in a public calling has a legal right to a reasonable compensation for whatever service he may render. To make this right practically available it is necessary that he should be permitted to demand his pay before the service is rendered. It would be impracticable, as well as unjust, to require him to perform the service and give credit to the applicant besides. Accordingly the law permits him to exact prepayment as a condition of rendering the service demanded (11). We shall also see that it is the unquestioned right of one engaged in a public employment to establish reasonable rules and regulations for the conduct of his business. This right is most often recognized by treating an applicant's refusal to abide by a reasonable rule or regulation as an excuse for denying his application for service. Thus, a railway company may eject from its train a person who, after failing to purchase a ticket at the station, refuses to pay the small additional sum exacted by way of reasonable regulation from passengers who pay on the train (12). For the same reason a water company may refuse to supply water to one, who, in defiance of the company's rules, persists in wasting the water supplied him (13).

SECTION 2. KIND OF SERVICE OWED.

§ 21. **In general.** That a public servant is bound to render only the kind of service which as a public servant

(11) Langley v. W. U. Tel. Co., 88 Ga. 777.
(12) Reese v. Pennsylvania Railroad, 131 Pa. 422.
(13) Watauga Water Co. v. Wolfe, 99 Tenn. 429.

he has undertaken to perform is self-evident. It needs no argument to show that an innkeeper is under no duty to transport persons or property, that a railway company cannot be compelled to supply gas, or that a telegraph company is under no obligation to install telephones. Yet the application of this simple principle leads to some interesting and complex problems. It is often a nice problem to ascertain the limits of a business that has been undertaken as a public calling. Just what are the duties of an innkeeper? What do we mean by common carriage? What service is an irrigation company bound to perform? What can be lawfully demanded of a light and power company? These questions open up a wide field of the law. The answer in each case depends upon that part of the law which is peculiar to the business in question. This answer may be found in the common law; it may be read in a statute limiting and defining the duties of a particular class of public employments; or it may be seen in a charter or franchise obtained under statutory authority.

§ 22. **Effect of public profession.** At common law the public callings were few and their general character well understood. Voluntary entrance into a public calling was followed by the imposition of its peculiar duties by operation of law. The question ordinarily was simply: what calling has been voluntarily entered? The answer to this question was found in the public profession made in each case. A leading case (14) will illustrate the principle. The action was to recover a sum of money which had been

(14) Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16.

intrusted by plaintiff to the master of defendant's steamboat to be carried from Nantucket to New Bedford, which money was lost or stolen. It did not appear that the loss was in any degree owing to the fault of the defendant or its servants. Consequently the defendant was not liable, unless the money had been received by the defendant as a common carrier of money, in which case it would have been liable as a virtual insurer. In rendering judgment for the defendant, Judge Story said that it was not shown that the owners of the boat had ever held themselves out as common carriers of money. With reference to the legal effect and importance of such public profession, he said in part: "In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties, and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged. They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters."

§ 23. **Effect of statute.** Nowadays the duties of public service companies are usually prescribed by statute. A recent case (15) will illustrate the practical operation of

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(15) Ferguson v. Metropolitan Gas Light Co., 37 How. Pr. (N. Y.) 189.

such a statute. It was treated by the court as measuring the extent of the company's duty and the court's effort was simply to place a reasonable construction upon its various provisions. The statute made it the duty of all gas companies to supply gas to the owner or occupant of any building or premises, for lighting purposes, upon written application; and provided a penalty for violation of this duty, such penalty to be paid to the person to whom the company might refuse to supply gas. The plaintiff was tenant of one floor of a house. Upon the application of the owner, defendant had installed a meter and supplied gas through it to the whole house. Plaintiff demanded that a separate meter be provided for his individual use. This the defendant declined to do, except on condition that plaintiff install separate and independent service pipes. Plaintiff thereupon sued for the statutory penalty. His right of recovery was denied by the court. After observing that the statute simply required the defendant to furnish gas and did not require it to provide meters as well, the court said:

"The owner of the building had exhausted the power to compel the defendants to furnish gas, under section six of the act referred to. They had granted his application for it, although they had declined to furnish separate meters, a neglect or refusal of which to him he alone could take advantage of. The gas having been thus furnished, no penalty was incurred by them, unless the omission to supply a meter to the plaintiff is fairly within the application for gas and included in it. This cannot be. The meter is employed for the benefit, not of the consumer but

the company, and cannot be used without tests which the former may insist shall be applied. If the company prefer, they may supply the gas without it, for aught that appears in this case. If the statute be strictly construed, the defendants are not liable, because they have furnished gas to the building which includes the premises occupied by the plaintiff, and which only they were bound to furnish, and if it be liberally enforced, then the defendants shall not be obliged to provide an article which is not required by the letter of the law, nor necessary to the plaintiff for the enjoyment of the light which he desires, nor should such a construction create a duty, which, under its provisions, is not declared.''

§ 24. **Effect of charter or franchise.** Often the kind of service owed is defined by a charter or franchise having the force of statute. Thus, in an Alabama case (16) the court found the duty of a gas company written in its charter. This duty was ''at all times to supply the inhabitants of the city of Montgomery, for private use, with a sufficient quantity of gas of the most approved quality.'' Under this provision plaintiff contended that, although he had made arrangements with another company for his regular supply of gas and would not agree to use any of the defendant company's gas, it was nevertheless the latter's duty to make the proper connections and keep on hand a supply of gas ready for his use in case of an accident to the rival company's plant. The question was therefore whether the duty to ''supply gas for use'' included the duty to keep the gas on hand for possible

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(16) Fleming v. Montgomery Light Co., 100 Ala. 47.

use in case of emergency, without any reciprocal undertaking on the part of the plaintiff. The court held that the charter created no such duty, either expressly or by implication. With respect to plaintiff's contention the court remarked, "There is no equality or equity in such a proposition."

Section 3. Duty with Respect to Facilities.

§ 25. **In general.** It is not always sufficient to know the species of service that may be demanded; it will often be important to ascertain the quality of service or the accommodations which must be provided. Granted that one may demand lodging of an innkeeper: must he be content to sleep on the floor, or is he entitled to a comfortable bed? Assuming that one may demand transportation of a carrier, how often must the carrier make the journey, how fast must he travel, and what must he do for the passenger's comfort? Assuming that one may demand gas of a gas company, what must the company do to insure him a steady supply of gas of good quality? Granted that one has undertaken a public employment, for how much business must he provide: may he provide facilities for as much public business as he chooses to handle, must he be ready for every emergency, or is there some middle ground? These questions may arise with reference to what may be demanded by a member of the public who is making an initial application for service, or they may arise with reference to what may be expected after the application has been accepted and the service undertaken.

§ 26. **When the actual service of an applicant has been**

entered upon, reasonably adequate facilities must be provided. When the actual service of an individual member of the public has been entered upon, it is doubtless true that the person for whom the service is being rendered may, at least in the absence of previous notice that the accommodations are inadequate, expect the usual and customary service, with whatever accommodations it includes, as a matter of right. Whatever may be the innkeeper's duty with reference to providing for guests who may apply, it is certain that the guest who has been received is entitled to reasonably adequate accommodations for eating and sleeping. Whatever may be the common carrier's duty to provide for goods which may be tendered for carriage, it is certain that, for the carriage of goods which he has accepted for transportation, he must provide reasonable facilities for their prompt and speedy carriage. The duty springs from the relationship and approaches that of contract.

§ 27. **Is there a common law duty to provide adequate facilities for expected business?** It may be conceded that the duty of providing adequate facilities for the reasonable service of those whose service has been actually undertaken is well established, but the question remains: is there a common law duty to prepare for future business? The cases do not furnish a satisfactory answer to this question. But some things are clear. There is certainly no duty to have accommodations in readiness for all who may possibly apply; for an emergency might bring scores to the village inn for food and lodging, or to the rural stage-coach for transportation. Nor is there

any common law duty to increase facilities to meet the normal growth of business. The duty of an innkeeper to add rooms to his inn, or of the carrier to increase the number of his horses or vehicles to meet the demands of growing trade, is unknown to the common law. On the other hand, it would seem that the public profession that one is maintaining an inn might carry with it a duty to make a reasonable effort to provide accommodations for at least a few travellers. Otherwise serious inconvenience might result from practical deception. At any rate it seems that the actual maintenance of an inn involves the duty to keep on hand a reasonable amount of food for the service of probable guests (17). And it appears that a passenger carrier's publication of a time-table makes it his duty to make a reasonable effort to operate his conveyances in accordance therewith (18). On principle, it would seem reasonable to hold that the public profession of readiness to render a specified public service, as a business, involves a duty to make a reasonable effort to carry on that business in accordance with the public profession, and consequently to provide adequate facilities therefor; but this principle can scarcely be said to have been definitely worked out in the decided cases.

§ 28. **Effect of enjoyment of special privileges on duty to provide facilities.** Whatever may be the law as to the extent of the accommodations which must be kept in readiness for applicants in the primitive public employment, where no special privileges of any kind are enjoyed, it is

(17) Atwater v. Sawyer, 76 Me. 539.
(18) Heirn v. McCaughan, 32 Miss. 17.

plain that the same rule would not necessarily apply to the modern public service company that enjoys special privileges in the streets, or has statutory authority to take private property for its use under the power of eminent domain. We have already seen that the exercise of these privileges is permitted on the principle that the public needs the service, for the supply of which these privileges are practically necessary. The reciprocal obligation to serve the public surely can not be limited by the mere will of the servant; in all reason it must extend to a reasonably adequate service. The running of a street-car once a week, the installation of a dozen telephones in a city, the supply of gas for fifteen minutes a day, would clearly not justify the use of the city streets for car tracks, telephone poles, or gas mains. The exercise of the right of eminent domain by the modern railway company would seem to require of this common carrier facilities for handling a traffic vastly heavier than was dreamed of by the wagoner of a century ago. That reasonable service and therefore reasonably adequate facilities for service may be demanded of a public servant, which enjoys special privileges, is well shown by the case of State v. Spokane St. Ry. Co. (19), in which the court held that a writ of mandamus commanding the operation of street-cars with reasonable frequency upon a certain street was properly granted, where it appeared that the defendant company was in undisturbed occupation of that street by its wires, poles, and tracks, with no intention of abandonment, although such occupation was

(19) 19 Wash. 518.

permissive only and not under a formal grant from the city. Said the court: "The franchise was granted to appellant by the state, not for its profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it, in consideration that it would provide facilities for communication and intercourse for the public. It is a common carrier. It was granted the power of eminent domain, a part of the sovereignty of the state, and, with the consent of the municipalities, it may lay its tracks over the public streets and highways. Such corporations, then, may not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant."

§ 29. **Adequate facilities usually required of modern public service companies by statute, charter, or franchise.** Theoretically the requirement of adequate facilities for the reasonable service of the public, on the part of those public service companies which enjoy special legal privileges, seems entirely clear; but practically there is little occasion for the application of such a principle, since such privileges are nearly always granted under statutes, charters, or franchises, which prescribe, as an obligation incident to the privilege, the maintenance of adequate facilities. Indeed the public service company of today usually exists under statutes or charters which require the performance of this duty, quite apart from special privileges conferred. Thus in one case (20) we find the court saying: "The laws of the state require each rail-

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(20) Ballentine v. North Mo. R. R. Co., 40 Mo. 491.

road corporation 'to furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation.' " In applying this statute the court further says: "The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on a given road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation." In another case (21) the court refers to a company's charter as requiring it to maintain its canal and locks in good repair and at all times free and open to the passage of boats, and considers this provision as warranting the use of a writ of mandamus to compel the keeping of the canal in a navigible condition, on the penalty of a forfeiture of the charter. In still another case (22), the court looks to a light company's franchise as measuring the extent of its duty to provide gas. In these cases the requirement of adequate facilities was of a general character. However, particular facilities of a special character are sometimes prescribed by statute in the interest of the public service. Thus, an Ohio statute required a railroad company, whose road was operated within that state, to cause three of its regular trains, each way, if so many were run

(21) Savannah & Ogeechee Canal Co. v. Sherman, 91 Ga. 400.
(22) Fleming v. Montgomery Light Co., 100 Ala. 657.

daily, to stop at any station, city, or village of three thousand inhabitants, for a time sufficient to receive and let off passengers. This was held to be a valid exercise of the police power in the interest of public convenience (23).

§ 30. **When facilities are adequate, their extent marks the limit of the public servant's duty.** Whatever may be the law as to the extent of the accommodations or facilities which must be kept in readiness for applicants, it is well settled that, where there is no question as to general adequacy to meet ordinary demands according to common law, statute, or charter requirements, the public servant's duty is limited by the extent of the actual facilities which his own discretion may provide. Thus where an applicant demanded a particular type of telephone apparatus, which the telephone company refused to provide, the court held that "satisfactory service" was all that he had a right to demand, that it was for the company and not for the subscriber to determine the type of apparatus it should use (24). The same principle appears in those cases in which the common carrier's duty is held to be measured by his available facilities. Thus, in a leading case (25), decided in 1681, it appeared that the plaintiff tendered a box of goods to a common carrier who refused to take charge of it on the ground that his coach was already full. It was held that the carrier was justified in his refusal. A modern case (26) shows

(23) Lake Shore & M. S. R. R. Co. v. Ohio, 173 U. S. 285.

(24) Gardner v. Providence Telephone Co. 23 R. I. 312.

(25) Lovett v. Hobbs, 2 Shower, 127.

(26) Browne v. Brandt, [1902] 1 K. B. 696.

the operation of the same principle in defining the duty of innkeepers. Plaintiff had demanded a bed at defendant's inn. Defendant refused, saying that the inn was full. The inn had six bedrooms, of which three were then occupied by guests, and three by the defendant's family and servants. The coffee-room and sitting-room were unoccupied at the time of plaintiff's application. He suggested that he would be satisfied if allowed to spend the night in the coffee-room. But this the defendant refused to permit, declaring that he never allowed anyone to sit up all night in the coffee-room. For this refusal the plaintiff brought his action. Held, that the action did not lie. Said Lord Alverson, C. J.: "I think a person who comes to an inn has no legal right to demand to pass the night in a public sitting-room, if the bedrooms are full, and I think that the landlord has no obligation to receive him." Darling, J., concurring said: "No doubt an innkeeper is bound to provide accommodations for travellers, but he is not bound to do so at all risks and costs. He is only bound to provide accommodations so long as his house is not full; when it is full he has no duty in that respect."

§ 31. **Actual limitation of facilities no excuse for arbitrary discrimination.** From what has heretofore been said it will be apparent that the mere lack of facilities to serve all who may apply can never be an excuse for an arbitrary discrimination among applicants. That would clearly amount to a repudiation of the great principle of equal service to all. What constitutes justifiable and what arbitrary discrimination in such case may often be a serious

problem. As a rule, service in accordance with the order of application is the natural basis of selection, and this rule must generally be observed (27); but there are cases when the public good demands the consideration of other circumstances. This is notably the case when a heavy stress of business or a sudden emergency makes a well equipped railroad unable to supply all demands for transportation. In such cases it is well settled that perishable property must be preferred to that which is non-perishable (28). In general any preference is justifiable that is demanded by public necessity. Thus the Interstate Commerce Commission held that a great strike in the anthracite coal regions, resulting in a temporary coal famine, warranted the preference of bituminous coal over other classes of goods awaiting shipment (29). In a Michigan case a railroad was held justifiable in giving preference to goods intended for the relief of sufferers in the great Chicago fire (30). Of course, if a choice must be made between saving life or saving property, the duty of the carrier is to save life first. Thus a railroad was held justified in neglecting to move freight out of the reach of a forest fire, where it appeared that its energies had been concentrated upon getting women and children to a place of safety (31).

(27) Keeny v. Grand Trunk R. R. Co., 59 Barb. 104.
(28) Tierney v. N. Y. Central & H. R. R. R., 76 N. Y. 305.
(29) Daish & Sons v. C. A. & C. Ry., 9 I. C. C. Rep. 513.
(30) Mich. Cent. R. R. v. Burrows, 33 Mich. 6.
(31) Pennsylvania R. R. Co. v. Fries, 87 Pa. St. 234.

SECTION 4. DUTY TO EXERCISE CARE.

§ 32. **Public servants must exercise reasonable care to avoid injuring others.** Whatever may be the limits of the public servant's duty to provide accommodations and facilities for the public service, it is very certain that he must at least do whatever is reasonably necessary for the public safety. Whatever facilities are necessary for the safe conduct of his business must be provided, in discharge of his general duty to avoid doing harm to others. The duty to exercise reasonable care is as universal as the corresponding right to be free from negligent injury. Every person who comes into relations with any other person is under a legal duty not to injure him by his negligence. What is true of the duty of a natural person in this respect is also true of the duty of a corporation. Men do not get rid of their duty to avoid injuring others by becoming incorporated. The corporation must exercise care in the selection of its servants; it must answer for the negligence of these servants when they act within the scope of their employment; it must keep its premises in a reasonably safe condition for those whom it invites upon its premises for business purposes; whatever tools or machinery be used in the conduct of its business must be carefully selected and handled with a view toward safety. It is unthinkable that the corporation should escape this universal duty of care by engaging in the public service. It is well settled that the public servant, whether a natural person or a corporation, shares with all other persons the duty of exercising reasonable care to avoid harming others.

§ 33. **Degree of care owed not affected by public nature of employment.** Although the public servant's duty of exercising care to avoid injuring others is well recognized, it should not be supposed that he is, as a rule, bound to exercise a different or higher degree of care than are those who are engaged in private occupations. The amount of care which is owed by a public servant, like that owed by any other person, varies with the circumstances of the particular case. Where there is little danger, the amount of care owed is correspondingly small. Where the danger is great, there is a corresponding duty to exercise great care. Dynamite must be handled with greater care than bricks. An employment which usually presents few dangerous situations naturally calls for the exercise of less vigilance than does an occupation which abounds in dangers. Accordingly, the amount of care that must ordinarily be exercised by a public servant depends upon the amount of danger that is usually involved in the conduct of his particular business. The public warehouseman does not carry on a dangerous business, and his duty is to exercise ordinary care (32). Companies engaged in the business of irrigation or water-supply can not be said to be engaged in a dangerous occupation, and no duty of extraordinary care rests upon them. But a gas company deals with a dangerous explosive and must exercise great care in handling it. The electric light and power company owes a similar duty in the management of its powerful currents of electricity. But neither of these companies is under a greater duty

(32) Jackson v. Sacramento Valley R. R. Co., 23 Cal. 268.

of care by reason of its public profession. A company which manufactures gas or electricity for its own consumption must take equal pains to control the dangerous agency. Not only does the degree of care required vary in different public employments, as well as in the various private occupations; different degrees of care must habitually be exercised in different branches of the same business whether it is public or private. Doubtless a telegraph or telephone company must exercise a very high degree of care in insulating its wires and otherwise controlling electric currents to avoid fires and other casualties; but, in the ordinary conduct of its business, it is required to use ordinary care only; in the transmission of messages the standard of care exacted is measured by the importance of the undertaking (33).

§ 34. Exceptional duties of carriers and innkeepers. We have already seen that the public servant is not, as a rule, an insurer against accident, and that he is ordinarily liable only where he is an intentional or negligent wrongdoer. We shall later see that the common carrier of goods is, subject to certain well-recognized exceptions, a virtual insurer of the goods entrusted to his possession, against all loss of damage from whatever source (34). Although the common carrier is a public servant, it should be understood that this liability is not shared by public servants in general. The innkeeper is under nearly if not quite as great a duty with respect to the goods of his guest (35); but the insurer's duty of the common carrier

(33) Breese v. U. S. Tel. Co., 48 N. Y. 132.

(34) See §§ 73, ff., below.

(35) Crapo v. Rockwell, 94 N. Y. Supp. 1122.

and innkeeper is to be explained on historical grounds, and not as an incident of public employment. Special mention should also be made of the public carrier of passengers. Unlike the common carrier of goods he is not an insurer against accidents; but he does owe an exceptionally high duty of care. It is, however, doubtful if this duty is owed so much because of the passenger carrier's public profession, as on account of the fact that he is engaged in an occupation the conduct of which necessarily involves practically constant danger to human life. Few occupations are fraught with the probability of such disastrous results from negligence, as that of the public carrier of passengers. And this is especially true of the modern railway company, which has become the great passenger carrier of today. At every moment of his journey the passenger's life depends upon the care with which the railway company maintains its road-bed, its rolling-stock, and its whole system of operations, as well as upon the immediate vigilance of the employees who have charge of the train. In 1809 Sir James Mansfield told a jury that the undertaking of the owner of a public stage was that "as far as human care and foresight could go" he would provide for their safe conveyance (36). Three quarters of a century later the supreme court of Indiana applied the law of today when, in an action for an injury caused by a defective railway bridge, it approved an instruction in which the jury were told, in substance, that while a carrier does not, in legal contemplation, warrant the absolute safety of passengers,

(36) Christie v. Griggs, 2 Camp. 79.

it is yet bound to the exercise of the utmost diligence and care, and that the slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render it liable to answer in damages (37).

Section 5. Duty with Respect to Discrimination in Rates.

§ 35. **Discrimination in general.** In discussing the public servant's duty of equal service to all we have necessarily dealt with two forms of discrimination. Although the nature of the undertaking may be such that the public duty is discharged by the service of members of a class only, it is well settled that, among the members of the class whom he has undertaken to serve, the public servant may make no arbitrary selection of applicants; he cannot serve some and refuse to serve others, without a substantial reason for making the distinction. We have also seen that it is equally well settled that his duty to serve all without discrimination extends to the character or quality of the service rendered; he cannot extend particular accommodations or facilities to some and arbitrarily deny them to others, relying upon his willingness to furnish inferior accommodations or facilities to the unfavored applicant, without violating his common law duty; in a word, his duty is not only to serve all, but to serve all equally. But a public servant may be ready and willing to serve every person who may apply; and he may be ready and willing to serve him with as high a quality of

(37) Bedford, etc. R. R. Co. v. Rainbolt, 99 Ind. 551.

service as that rendered the most favored applicant; still he may be guilty of a third form of discrimination against him—he may exact from him greater compensation than he requires of others. It is this third form of discrimination, discrimination in rates, that has of late years attracted so much attention from the public, from Congress, and the state legislatures, as well as from the courts.

§ 36. **Discrimination in rates: Opposing views.** It is difficult to see any difference in principle between discrimination in charges for service and discrimination in the service itself. If public duty forbid the latter, it would also seem to forbid the former. Arbitrary discrimination between individuals, whether as regards willingness to serve at all, the quality of service rendered, or the compensation demanded, seems essentially inconsistent with the very idea of public service as a public duty. And yet such a distinction has been made. Half a century ago it was thought that there was no rule against discrimination in rates; the law with respect to compensation was supposed to stop with the requirement that compensation must in all cases be reasonable. Later the courts which held this view began to say that, although there was no rule against rate discrimination as such, nevertheless the existence of such discrimination might be evidence bearing upon the question as to whether a particular rate was reasonable. Meantime another view had gained a considerable following: some courts took the ground that discrimination in rates, as well as discrimination in service, and quite apart from the question of reasonableness, was in itself a violation of the public

servant's obligation. Although thoroughly in accord with the great principle of public duty, and nowadays made the basis of many statutes forbidding discrimination in rates by public service companies, the doctrine that discrimination in rates is, without more, unlawful, can scarcely be said to prevail generally. On the whole, the view that discrimination in rates is not of itself unlawful, but may be considered as evidence bearing upon the question of reasonableness, is probably the one most generally followed where the courts are not guided by statute. It should be remembered, however, that very extensive legislation upon this subject with the purpose of preventing rate discrimination by public servants, has made obsolete in many jurisdictions the common law rule established by previous decisions.

§ 37. **Early common law doctrine: Discrimination in rates not unlawful.** The leading American case in support of the old view that rate discrimination is not of itself illegal is Fitchburg v. Gage (38). In that case a shipper resisted a claim for freight charges upon the ground that the rate was excessive. He did not undertake to show that it was unreasonable, considering the service rendered, but he relied upon the fact that the company had given others a twenty cent rate upon goods of the same class as those upon which he had been charged a fifty cent rate. With respect to this contention the court said: "It (the common law) requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted

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(38) 12 Gray, 393.

right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals, for a certain time or in certain quantities, for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could of course make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation."

§ 38. **Modified common law doctrine: Discrimination in rates may be evidence of unreasonable rates.** Business men are not prone to charge for their goods or services a price that will not amount to a reasonable compensation. Accordingly, when a public service company establishes a rate for a particular service and makes that charge to the public in general, we naturally suppose that such a rate is high enough to amount to a reasonable compensation. If, for any reason, the company refuses to render its service to a particular individual at this rate, but exacts a higher charge instead, we naturally conclude that such a charge is excessive and a violation of the company's obligation to serve all at a reasonable rate. That such an inference is entirely proper is recognized by those courts which deny that rate discrimination is per se unlawful. This is well illustrated by Menacho v.

Ward (39), a leading case upon the subject. In that case the defendants, who were owners of steamships plying between New York and Cuba, threatened to advance the freight rates on all shipments by the plaintiffs in case the latter should patronize the defendants' rivals. Plaintiffs disregarded the threat, shipped goods by other steamers, and were accordingly blacklisted by the defendants. In granting their motion to enjoin the defendants from making such discrimination the court said:

"Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public. . . . In the present case the question whether the defendants refuse to carry for the complainants at a reasonable compensation resolves itself into another form. Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other

(39) 27 Fed. 529.

shippers do not? The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by the party upon the value of his own services or property is always sufficient, against him, to establish its real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public."

§ 39. **View that discrimination in rates is of itself illegal.** It may well happen that in a particular instance the plaintiff may be unable to show that the rate exacted of him is unreasonable, when considered with reference to the nature and cost of the service furnished and the charges which are customarily made for the same service, and yet he may be able to prove conclusively that, by reason of special favors granted to a competitor, his business interests have suffered greatly. A dozen merchants may be charged a freight rate that under all the circumstances is reasonable. If all pay the same rate none of them can complain. If one is singled out and made to pay more he can show the prevailing rate as evidence that he is overcharged. But suppose it appears that one of the twelve is being charged less than the cur-

rent rate, either directly or through the operation of a rebate. One of his fellow-merchants complains of this discrimination. If the sole requirement is that the charge must amount to no more than a reasonable compensation, it is plain that his complaint will be unavailing, for, tested by the service and the prevailing practice, the rate charged him is not unreasonably high. His real complaint is that the favored merchant's rate is too low. And yet we feel that he should have some sort of relief. Favoritism to his competitor in the matter of freight rates may result in the creation of a virtual monopoly, by making it possible for the competitor to undersell him at every point. And what is true of merchants may be equally true of manufacturers and of shippers of live-stock and grain. The grave consequences of this form of discrimination have resulted in a growing tendency to hold that such discrimination is unlawful in itself. This view has been well expressed in Messenger v. Pennsylvania Railroad Co. (40), a leading case. In that case the defendant had agreed to give the plaintiff a preference in freights between two points. The plaintiff sued for breach of contract, alleging that the defendant had carried goods for others at a lower rate than that charged the plaintiff. The court held that the contract was illegal as opposed to public policy. In support of this conclusion the court said:

"The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment

(40) 37 N. J. L. 531.

of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price, for the same kind of service under like circumstances, is most unreasonable and unjust when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired."

§ 40. **Excusable discrimination in rates.** Notwithstanding the general rule against discrimination between

individuals with respect to the rendition of service, we saw that not every discrimination in service was necessarily wrongful. Indeed it appeared that the ban of the law fell upon unjustifiable and arbitrary discrimination only. And just as there are circumstances that will warrant a public servant in serving some applicants and denying service to others, so there are conditions that will justify discrimination between individual patrons of a public service company with respect to charges. In those jurisdictions which recognize a distinct rule against rate discrimination as such, the rule is deemed to go no farther than to forbid discrimination in charges for like services under like conditions. However, it is often a nice question to determine whether the conditions are substantially equal or essentially dissimilar. Thus, in Hays v. The Pennsylvania Co. (41), a case in which it was decided that a discrimination in rates for carrying coal, consisting of a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year, the amount of rebate being governed by the quantity of freight furnished by each shipper, was unlawful because in effect a discrimination in favor of capital, the court conceded that for guaranteed shipments in large quantities a lower rate might lawfully be made. Upon the question as to what constitutes unjust discrimination, we cannot do better than to quote a passage from the opinion of Baxter, C. J., in this case:

"It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust

(41) 12 Fed. 309.

discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to anyone. Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the ac-

commodations furnished to that class, than it does to carry an occupant of a palace car. And, for a like reason, an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in handling.''

§ 41. **Law as to rate discrimination not restricted to public carriers.** Owing to the enormous proportions of our railway traffic and to the power of the railroads to build up or ruin by favoritism a business, an industry, or a locality, complaints of unjust discrimination, and consequently cases involving it, have most frequently arisen with reference to railroads. But it will be noted that in all of these cases it is the public nature of the railroad's business and not the fact that it is a railroad that has been considered as affecting the legality of rate discrimination. Of course the capacity of some public service companies to do harm by discrimination is not nearly so great as is that of others; in some cases it may possibly be quite negligible, but it is safe to say that discrimination by any public service company, resulting in actual damage to a member of the pubic, would be treated by the courts in precisely the same manner as discrimination by a railway company or other public carrier causing similar damage. This is borne out by the case of Western Union Telegraph Co. v. Call Publishing Co. There it appeared that the telegraph company had charged the plaintiff five dollars per hundred words for transmitting news dispatches, whereas it charged a rival newspaper publisher but one dollar and a half for transmitting the same number of words. The action was brought for the

recovery of damages for the alleged wrong. After being twice before the supreme court of Nebraska, the case was finally disposed of by the Supreme Court of the United States, which affirmed a judgment awarding as damages the difference between the charges actually paid by the plaintiff and what it would have been charged for the same service had the plaintiff obtained the same treatment as that accorded its competitor (42). When the case first came before the state court that tribunal, relying largely upon railway cases, thus stated the law as to rate discrimination.

"It is argued by the telegraph company that no cause of action can be predicated upon the mere fact that another patron obtained services for a lesser rate, unless it be shown that the rate charged the complainant is in itself unreasonable and excessive. There are cases to this effect, but we cannot lend our assent either to their reasoning or to their conclusion. On the contrary, we believe the true rule to be that rates must not only be reasonable in themselves but relatively reasonable; that is, that a person or corporation engaged in public business, and obliged to render its services to all persons having occasion to avail themselves thereof is bound in fixing rates to observe two rules: First, its rates must be reasonable; and, second, it must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other. . . . But it is not unjust discrimination—it is not con-

(42) W. U. Tel. Co. v. Call Pub. Co., 181 U. S. 92.

trary to the common law, and it is not contrary to our statute—to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable'' (43).

§ 42. **Rate discrimination under the Interstate Commerce Acts.** Attention has already been called to the abundance of state and federal legislation upon the subject of rate discrimination. The limits of this article forbid extended notice of this legislation, but the importance of the Interstate Commerce Acts in their bearing upon the subject is such as to warrant special consideration. Section 2 of the Interstate Commerce Act of 1887 provided that all charges must be equal for ''a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.'' As this section was not changed by the Act of 1906 it is still law as regards interstate carriers. In 1892 this section was construed by the United States Supreme Court in deciding the question, whether a ''party-rate ticket'' for the transportation of ten persons or more, at a less rate than that charged to a single individual on the same trip, was an unjust discrimination within the meaning of this section. Said Mr. Justice Brown, in delivering the opinion of the court: ''In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but in either case it must be for

(43) W. U. Tel. Co. v. Call Pub. Co., 44 Neb. 326.

a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially indentical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale, cheaper proportionately than upon a small scale, this is impossible" (44).

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(44) Interstate Commerce Com. v. B. & O. Railroad, 145 U. S. 263.

CHAPTER IV.

RIGHTS OF PUBLIC SERVICE.

SECTION 1. RIGHT TO COMPENSATION.

§ 43. **Public service entitled to reasonable compensation.** It is a familiar rule of law that every person who performs services for any other person, under circumstances negativing an intention to work gratuitously, is entitled to a reasonable compensation for what he does. Of course it matters not whether the services are rendered by a natural person or by a corporation. Unless the law discriminates against a public servant as such, it follows that the public service company, as well as a natural person engaged in a public calling, is, as a matter of law, entitled to a reasonable compensation for all services rendered. The law could not wisely make such a discrimination. Without a right to payment for services performed as a matter of business, none would enter the public service. This right of the public servant is as clearly recognized by the common law as is his duty to serve the public. Indeed, as we shall presently see, this right is deemed by the courts to be secured by constitutional guaranty as well.

§ 44. **How the right to compensation is enforced: Right of action. Lien.** When a particular service has been

rendered by a public servant; when, for instance, goods have been transported by a carrier, lodging has been furnished by an innkeeper, or electricity supplied by a lighting company, the right to compensation is enforceable in a court of law. When the service has been rendered under a definite agreement as to price, an action may be brought, after a refusal of payment, as for breach of an express contract. When it has been done upon the defendant's request but in the absence of a definite agreement as to compensation, the action may be brought as for breach of an implied contract. But the right to bring an action for damages for breach of contract is not the law's only recognition of the fundamental right to compensation. Some public employments require those who are engaged therein to take possession of goods, and either to keep them safely or to do work upon them. When, in the course of his duty, a public servant does thus take charge of goods, he becomes a bailee for hire, and, like other bailees for hire, acquires a lien upon the goods as security for the payment of his charges. The right of the warehouseman to refuse delivery until his charges for storage are met, and the right of the common carrier to hold the shipper's goods until the freight is paid are familiar examples. The innkeeper also has a right to detain his guest's baggage, until his charges for entertainment are paid. His right seems to rest entirely upon the public nature of his employment and his duty to receive all who apply, for he detains his guest's baggage, not to secure payment for services done in relation to the baggage itself, but rather as a security for the payment

of his charges for entertaining the guest. However, not all persons engaged in public employment enjoy the advantage of such a lien, for not all of them take charge of goods for their patrons. Obviously a lien could avail nothing for a telephone, water, or gas company. But the absence of a lien does not necessarily mean hardship—that is only one way of enforcing payment for services rendered. We have already seen that the public servant may exact prepayment as a condition precedent to the rendition of any service at all. Such a privilege is ordinarily an adequate protection of his right to compensation.

§ 45. **Same: Prepayment.** The privilege of exacting prepayment as a means of enforcing the right to compensation has given rise to considerable litigation. It has been contended that a public servant might not demand payment in advance from one applicant while extending credit to another; but it has been held that this is not a discrimination for which anyone has legal ground of complaint, that the public duty is discharged by serving all without unjust discrimination for a reasonable compensation, that the public servant may exact prepayment when to him such a course seems advisable, although, for reasons satisfactory to himself, he may in particular cases waive this privilege and extend credit to selected applicants. Again, when the right to demand prepayment has not been questioned, controversies have sometimes arisen over the manner in which prepayment has been exacted. No difficulty is presented when the extent of the service demanded is exact and definite, and

the amount of compensation a matter of simple computation. Thus, the words of a message delivered to a telegraph company may be counted and the charges ascertained accordingly. So goods tendered to a carrier for shipment may be classified and weighed, and the freight charges determined with exactness. But the pre-ascertainment of compensation is not always so simple. Ordinarily it is uncertain how much gas, water, or electricity will be used by any customer within a given time. Of necessity resort must be had to different expedients. One of them, familiar to everybody, is the use of the principle of the slot machine. A coin is dropped in the gas-meter; payment in advance is thereby made for a small quantity of gas. An equally familiar, though less exact method, is the so-called "flat rate." Whatever be the method employed, the amount demanded by way of prepayment must bear a relation to the probable use, and it must not be exacted an unreasonably long time in advance of the period of consumption. Thus, where a public service company demanded, as a condition precedent to the supply of water for irrigating purposes during one season, the sum of $10.00 per acre as part payment for the use of water for ten consecutive seasons, it was held that such a demand was unreasonable and a mandamus was accordingly issued commanding the company to supply water for the current season upon payment of the season rate (1). Sometimes the most practicable means of enforcing prepayment is to require the deposit of a considerable sum of money as a security for the

(1) Wheeler v. No. Colo. Irrigation Co., 10 Colo. 582.

punctual payment of accruing charges. Here too the test is that of reasonableness. Thus in Williams v. Mutual Gas Co. (2) it appeared that the plaintiff was using $60 worth of gas per week for lighting his hotel and that his requirements were increasing, and that this large consumption of gas led the company to require the plaintiff to keep on deposit with it, as a security for the payment of his bills, the sum of $100. The plaintiff regarded this as unreasonable, tendered the defendant company $75, and demanded that it supply him gas to that amount. This the defendant refused to do. The court held that the condition imposed by the defendant was reasonable, and that the plaintiff had therefore no ground of complaint.

§ 46. **Rate regulation: Constitutional right to reasonable compensation.** It has long been recognized as a common law principle that a public service company may not charge more than a reasonable rate. When an excessive rate is exacted as a condition to the performance of a public service by one in a public employment, an action for damages may be maintained, or, in a proper case, a writ of mandamus obtained. This requires a determination by the court that the particular rate is excessive; but such a determination is binding upon the parties only. The court can never establish a rate which must be observed by a public servant in the future. On the other hand it is well established that the legislature, either directly or through the agency of a properly constituted commission, may fix rates binding upon a public service

(2) 52 Mich. 499.

company in all cases. In Munn v. Illinois (3) it was held that such an exercise of the legislative power was not reviewable by the courts; but subsequent cases have practically overruled that case on this point and it may now be considered settled that the courts will set aside the rate of the legislature or commission, when it is clearly proved to be unreasonably low. Said the United States Supreme Court in Reagan v. Farmers' Loan & Trust Co. (4): "The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. . . . It was, therefore, within the competency of the circuit court of the United States for the western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission." In such an inquiry the court does not properly adopt as a standard its own view as to what the legislature ought to have done as a rate-fixing body. The discretion rests with the legislature or commission. Every presumption is in favor of the soundness of its exercise. It is, at least in legal theory, only where the rate-making body has acted unreasonably, where there has been something like an abuse of discretion, that the legislative action is set aside. Thus it will be noted that the burden of proof as to the reasonableness of a particu-

(3) 94 U. S. 113.
(4) 154 U. S. 362.

lar rate depends upon the nature of the inquiry. Where a patron of a public service company complains of a rate as being too high, the burden is upon him to show that it is unreasonable. Where a public service company complains that a rate established by law is unreasonably low, the burden is upon it to show that the rate is unreasonable. But, in either case, the ultimate question is the same: does the rate provide for a reasonable compensation?

§ 47. **Same: Basis for determining rates.** The question, what constitutes a reasonable compensation, necessarily involves a consideration of two opposing interests: the interest of the public servant demands "all that the traffic will bear;" the interest of the consumer is of course best served by the lowest compensation for which the service may possibly be secured. The court must usually reach a compromise of these opposing interests, not by the application of a hard and fast rule, but by the consideration of numerous data and special circumstances. It cannot be guided wholly by supply and demand, for often the particular service is supplied under conditions amounting to monopoly. It cannot rely wholly upon the amount of money invested, for, on the one hand, this would exclude compensation for good will in case the investment had been wisely made, and, on the other, it might compel the public to pay for waste and extravagance in case it had been unwisely made. It cannot depend upon the outstanding indebtedness represented by bonds, for successive bond issues may represent successive vicissitudes and bear no real relation to the value of

the property devoted to the public use. Nor can it safely rely upon the amount of stock outstanding upon which dividends are to be paid, for possibly the stock was "watered." Neither does the cost of reproduction furnish an adequate test, for this excludes all consideration of the value of the business as a going concern, built up, it may be, through risks and deserving enterprise, and, furthermore, is often practically incapable of ascertainment, since the business itself, as distinguished from its material "plant" may be incapable of reproduction at any price. And yet all of these circumstances may, in an individual case, be legitimate subjects of inquiry.

§ 48. **Same: Opinion in Smyth v. Ames.** In this connection we cannot do better than to quote from the opinion of Mr. Justice Harlan in the case of Smyth v. Ames (5), a case involving the constitutionality of a Nebraska statute undertaking to establish maximum freight rates. The statute was held unconstitutional on the ground that it deprived the railroads concerned of the "just compensation secured to them by the Constitution." Said Mr. Justice Harlan in delivering the opinion of the court:

"The corporation may not be required to use its property for the benefit of the public, without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: 'Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is re-

(5) 169 U. S. 466,

quired to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public.'

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in

each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Section 2. Right to Make Regulations.

§ 49. **Nature and extent of the right.** Order and system are essential to the economical and profitable conduct of most forms of business. Public employments form no exception to the general rule. And the systematic conduct of a public business is as necessary to the efficient service of the public, as it is to the production of profits for the public servant. It necessarily follows that he should be permitted to do whatever is reasonably necessary for the systematization of the business which he carries on. Accordingly the law allows him to adopt such rules and regulations for the government of his business as are, under all the circumstances, reasonable. Hence he is said to have the right to make reasonable rules and regulations. Usually the assertion of this right takes the form of a condition imposed upon the rendition of service. Upon the applicant's compliance with the regulation, the service is rendered; upon his refusal to comply with it, the service is denied. The applicant's refusal to comply will constitute an excuse for the denial of service, provided only that the rule or regulation, with which compliance was required, is reasonable. Hence it follows that the reasonableness of a particular regulation will ordinarily be determined in an action in which a member of the public seeks damages for a refusal of service, following his

own refusal to comply with such regulation. In deciding whether or not it is reasonable, the court will necessarily regard both the interests of the public and those of the person by whom the business is carried on. The application of this principle will be illustrated by characteristic rules of some of the more important of the public employments, and the treatment of these rules by the courts.

§ 50. **Innkeepers' regulations.** The comfort of the travelling public requires that the innkeeper should maintain order and decorum within his inn. Reasonable rules adopted for that purpose are of course well within the innkeeper's rights. They give rise to little or no controversy. However, the innkeeper's rules are not all adopted for that purpose. At common law he is bound to receive at his inn whatever luggage his guest may bring with him. For the safe keeping of this luggage, the innkeeper is practically liable as an insurer. By the majority view he is liable for all goods of his guest that are lost from the inn, unless the loss was caused by the fault of the guest himself, the act of God, or of the public enemy (6). To mitigate the severity of this requirement, the innkeeper is prone to resort to regulations designed to reduce the chances of loss to a minimum. All travelers are familiar with the commonly adopted rule that "the management will not be responsible for valuables unless they are deposited at the office." The attitude of the courts toward such rules may be inferred from two leading cases upon the subject. In Fuller v. Coats (7) the plaintiff

(6) Beale, Innkeepers and Hotels, §§ 183-186.

(7) 18 Oh. St. 343.

sought to recover the value of an overcoat and articles in the pockets thereof, alleged to have been stolen from the defendant's hotel while the plaintiff was a guest therein. The defense was that the defendants had provided a room for overcoats, with a custodian in attendance, whose duty it was to receive overcoats belonging to guests and to care for them when they were not in the personal custody of their owners, that the plaintiff had notice of this regulation, but that he had nevertheless hung his overcoat upon a hook in an open hall, from which it was taken without the fault or knowledge of the defendants. In upholding the validity of this defence the court said:

"The public good requires that the property of travelers should be protected from loss; and, for that reason, innkeepers are held responsible for its safety. To enable the innkeeper to discharge his duty, and to secure the property of the traveler from loss, while in a house ever open to the public, it may, in many instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest to secure the safety of his property. When such means and requirements are reasonable and proper for that purpose, and they are brought to the knowledge of the guest, with the information that, if not observed by him, the innkeeper will not be responsible, ordinary prudence, the interest of both parties, and public policy, would require of the guest a compliance therewith; and if they should fail to do so, and his goods are lost, solely for that reason, he would justly and properly be chargeable with negligence. To hold otherwise, would

subject a party without fault to the payment of damages to a party for loss occasioned by his own negligence, and would be carrying the liability of innkeepers to an unreasonable extent.''

§ **51. Same (continued).** In Pope v. Hall (8) we see the natural limitations of the regulation upheld in Fuller v. Coats. This action was brought against the proprietors of a hotel to recover damages for a watch and chain and gold coin, alleged to have been stolen from the plaintiff's trunk while he was a guest at their hotel. The defendants relied upon a regulation which provided that all money, watches, and other valuables must be deposited in the safe at the office, and that the proprietors would not be responsible for any such articles stolen from the rooms. While not denying the propriety of such a rule when applied to considerable sums of money or certain classes of valuables, the trial judge said: ''They (innkeepers) have no right to require a traveler to deliver up to them his necessary baggage, his watch which adorns his person and is a part of his personal apparel, and the money which he has about him for his personal use. Such a regulation is contrary to law and reason.'' In approving this ruling of the trial judge the appellate court said:

''The traveler, who arrives at the inn where he intends to lodge during the night, ought not to be required to part with his watch which may be necessary to him to regulate his rising, or to know when the time of departure of the morning train or boat has arrived. Neither ought he to be required to deposit with the innkeeper such small sums

(8) 14 La. Ann. 324.

of money as are usually carried by the majority of persons in the like condition in life visiting such hotel. The innkeeper should provide safe locks or fastenings to the rooms, and, in default of the same, he must be held responsible for the loss of such articles of apparel and small sums of money as are usually carried or worn by the class of persons favoring the hotel with their patronage.''

§ 52. **Carriers' regulations.** The magnitude of the business carried on by public carriers of goods and passengers is such as to necessitate the adoption of numerous rules for its orderly and efficient management. With such of these rules as apply to the conduct of the carrier's employees we are not here concerned; but many of them are prescribed for the observance of the shippers and passengers themselves. In accordance with the general principle, the only limitation upon the carrier's right to impose such rules upon his patrons is that they must be reasonable. Thus, the carrier of goods may require that all goods offered for shipment must be offered for carriage at designated stations. When the stations are sufficiently numerous to meet the reasonable needs of the public, this right is taken for granted and accordingly never questioned. Not only may they be required to be tendered at the station, but the carrier may prescribe the hours during which such goods will be received, and he may further require that they be offered for shipment within a designated time of the departure of the train upon which it is desired that they be shipped. It is obvious that a carrier, and particularly a carrier by rail,

should not be required to receive goods at any point along the line of carriage; that the adequate service of the public does not require every station to be open at all hours day and night; and that a carrier should not be required to convert a station into a storehouse for goods to be shipped in the indefinite future; so all of these regulations are sound in principle. The only requirement is that they be in themselves reasonable under the circumstances of each case. But, in their zeal to regulate, these carriers sometimes overstep the bounds of reasonable limitation. Thus in one case (9) it appeared that a railway company, which maintained a wharf for the receipt of coal for shipment from vessels alongside, undertook by rule to require all vessels unloading coal for shipment in the company's cars to employ the company's own shovelers in handling the coal, although the company charged for their services two cents per ton in excess of the current wages. It was held that this rule was unreasonable. Said Shipman, J.:

"The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation. . . . The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries 'for all people indifferently.' But, while admitting

(9) 318½ Tons of Coal, 14 Blatch. 453.

this duty, the company has declared that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shoveling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner, You shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods."

§ 53. **Same (continued).** In the case last considered the carrier had sought by the imposition of a rule to escape one of its duties as a public servant. Of course no rule could have that effect. In Phillips v. Southern Railway (10) we have a case in which a rule, although resulting in great hardship to the plaintiff, was supported on the ground that it was in no sense inconsistent with a full

(10) 124 N. C. 123.

discharge of the carrier's public duty. The plaintiff entered the defendant's waiting-room at about eight o'clock at night, intending to remain there until the departure of his train at 1:20 o'clock the next morning. The rules of the company required the waiting-room to be closed after the departure of defendant's train, and to remain closed until thirty minutes before the departure of the next train. Under this rule it became time to close the waiting-room. The agent accordingly informed the plaintiff that according to the rules of the company she must close the room and that he would have to get out. The plaintiff protested and refused to leave, but, upon the appearance of a baggage-clerk who threatened to put him out, the plaintiff left. The night was cold; the plaintiff was thinly clad and had no place to go where he could be comfortable; in consequence he suffered from exposure, contracted a violent cold, and suffered a spell of sickness by which his health was permanently impaired. The court said that the only question in the case was as to the reasonableness of the rule and that, although it might be otherwise in case of through passengers or delayed trains, the rule was reasonable as applied to the plaintiff; that waiting-rooms were not a part of the ordinary duties pertaining to the rights of passengers and common carriers; that they were established as "ancillaries to the business of carriers and for the accommodation of passengers, and not as a place of lodging and accommodation for those who are not passengers."

§ 54. **Same (continued).** Most railroads have a rule requiring passengers to purchase tickets at the station

before entering the train and impose a small extra charge, which may or may not be refunded, when the rule is violated and payment is made on the train. Such a rule is reasonable when the company provides sufficient opportunity for the purchase of a ticket at the station before the departure of a train (11). But, where it appeared that owing to the company's negligence the station was not open in time to enable the plaintiff to procure a ticket before the departure of his train, it was rightly held that the rule afforded no justification for exacting the extra charge when payment was made on the train—under such conditions the enforcement of such a rule was clearly unreasonable. With respect to the passenger's rights under such circumstances the court said: "The passenger may, under such circumstances, either pay the excess demanded under protest, and afterwards recover it by suit, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train" (12). Again, it seems to be settled that a public carrier may require colored persons to occupy separate seats or cars equally as safe and comfortable as those furnished other passengers; for equality of service does not mean identity of service, and such a regulation may tend to preserve order by preventing collisions arising from well known repugnances, and is therefore not unreasonable (13). But, as we have already seen, the carrier can make no valid regulation which will exclude a colored person from enjoying accommodations equal to those provided for

(11) Reese v. Pennsylvania Railroad, 131 Pa. 422.

(12) Forsee v. Alabama Great Southern Railroad, 63 Miss. 66.

(13) West Chester & Philadelphia R. R. Co. v. Miles, 55 Pa. 209.

other passengers, for such a rule would contravene the great principle of equal service to all and would therefore be unreasonable (14).

§ 55. **Rules of telegraph and telephone companies.** Said the court in Western Union Telegraph Co. v. McGuire (15): "One of the incidental and inherent powers of all corporations is the right to make by-laws for the regulation of their business. There is no conceivable reason why telegraph companies should not have this general power; nor is there any doubt under the authorities that the power resides in them." This remark would apply as well to telephone as to telegraph companies. In many respects the two kinds of service are closely analogous. Naturally some rules are frequently adopted that are common to both. It is plain that a rule requiring claims for losses arising from the negligent transmission of messages to be presented within a certain time after the loss occurs would be as reasonable for the one business as for the other. That such a rule may be reasonable, when the time is not too limited, is well settled, just as it is in the case of carriers. It is plain, too, that the same considerations would apply in determining the reasonableness of a rule requiring prepayment for telephone messages, as of one requiring prepayment for telegrams. In the case last cited the defendant company had a rule which provided that all transient persons sending telegrams which required answers must deposit an amount sufficient to pay for ten words. The plaintiff refused to

(14) C. & N. W. Ry. v. Williams, 55 Ill. 185.

(15) 104 Ind. 130.

comply with this rule, was accordingly denied the services of the company, and brought his action to recover a penalty required by statute to be paid by a telegraph company in the event of an unlawful refusal to send a message for a member of the public. In denying a recovery the court said: "Affirming, as principle and authority require us to do, that the telegraph company had power to make by-laws, the remaining question is whether the one under immediate mention is a reasonable one. It is established by the authorities that an unreasonable by-law is void. . . . We are unable to perceive anything unreasonable in the by-law under examination. A person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. . . . The telegraph company has a right to proceed upon this natural inference and to take reasonable measures for securing legal compensation for its services."

§ 56. **Same (continued).** Like the railroads, the telegraph and telephone companies find it necessary in many cases to conduct their business during certain hours only. In the city it may be practicable and profitable to maintain a force of operators day and night, but in the small town or village the limited amount of business makes such a practice financially impossible. Accordingly, these companies have a right to make rules limiting the time during which their offices will be open for the transmission, delivery, or receipt of messages; and, when such regulations are reasonable, a party who contracts with the company for the transmission of the message is bound by

them, provided he has notice of their existence. Some question has arisen, whether the sender is precluded from complaining of delay resulting from the observance of office hours, in a case where he has no notice of the observance of such hours at the receiving office. But the general rule appears to be that, in the absence of a special request for information as to the time of delivery or of what amounts to a special contract to transmit immediately, it is not necessary for the company to notify the sender of the office hours of the company at the place to which his message is directed. Said the supreme court of Texas in a leading case (16): "It seems to us that the reasonableness of a regulation as to hours of business is sufficiently obvious to suggest to the sender of a message, who desires its delivery at an unusually early hour for business, the propriety of making inquiry before he enters into the contract." Of course the question as to what rules are reasonable is to be decided upon the circumstances of each case.

§ 57. **Regulations of gas and water companies.** Gas and water companies have much in common. Each requires the use of the streets for its mains. Each supplies a substance from a central plant by means of conduit pipes to residences and other buildings, where the substance is consumed. Necessarily the compensation to which each is entitled must depend upon the volume of consumption, and in each case the ascertainment of this volume is most accurately secured by means of a meter. In the absence of a meter each naturally resorts to a "flat rate," based

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(16) Western Union Tel. Co. v. Neel, 86 Tex. 368.

upon the use of certain fixtures and the average consumption indicated by such use. Presenting similar problems, the two businesses tend to develop similar rules. They may therefore well be considered together. In Weise v. Sedalia Gas Light Co. (17), the problem of meter charges, obviously the same problem for both gas and water companies, was considered. The facts and the law of the case will appear from the paragraphs quoted below:

"It is a well-understood principle that a corporation, so engaged as the appellant gas company, may, in its dealings with the people, adopt and enforce such reasonable and just rules and regulations as may be necessary to protect its interests and further the designs of its incorporation. They have such power, too, without an express grant to that effect. It is an inherent power implied from the nature of the business in which they are engaged, limited only by express statute or ordinance, or by a sense of what is right, reasonable and just. The relator in this action contends, however, that the rule or regulation of the Sedalia Gas Company, prescribing payment by the consumer of $1.25 per month, where the amount of gas used is less per month than five hundred cubic feet—the designated $1.25 per month being denominated rent of meter—is 'unjust, unreasonable, and discriminatory.' What is just and reasonable is to be determined by the nature of the employment pursued by the corporation and the uses and conveniences of the public. There must be a reasonable protection of the interests of the one, consistent with the reciprocal rights of the other. Irrespec-

(17) 34 Mo. App. 501.

tive, now, of any ordinance provision, can it be said that this charge of $1.25 per month on a consumer of less than five hundred cubic feet of gas is unreasonable? We think it is not unjust or unreasonable. The evident purpose of this rule was to exact fair compensation from those requiring gas connection and gas furnished at hand, though the amount consumed should be very small, almost nominal.

"It is a matter of common knowledge, that, to furnish gas at hand for the very small or nominal consumer requires the same outlay, in the way of a meter, periodical inspection and repairs, with weekly or monthly visitations, that is required of very large consumers. The same investment and the same care and oversight is required where the gas monthly consumed shall not exceed ten cubic feet or even one cubic foot, as where the amount used may be ten thousand cubic feet. At the rate charged then in Sedalia, as alleged in relator's complaint, the gas company would be required to invest and expend, for the benefit of this merely nominal consumer, more dollars than cents received. The rate there charged, as alleged, is $2.50 per thousand cubic feet. For this ten cubic feet thus consumed, and for which the company could receive pay of only two and a half cents, the cost to the gas company may be many dollars."

§ 58. **Same (continued).** In Watauga Water Co. v. Wolfe (18), the court considered a rule which required users of water to keep the hydrants closed except when using the water. This rule the plaintiff had refused to

(18) 99 Tenn. 429.

obey, insisting upon his right to keep the water running in his hydrant in order to keep the water fresh. The company accordingly refused to supply him with water and he brought his action for damages. It was held that he could not recover. Said the court: "The rule in question was reasonable and Wolfe's refusal to comply with it disentitled him to receive the water, and relieved the company of its obligation to furnish it. This does not imply that a patron of a water company is not entitled to 'pure, good water,' but only means that he may not set himself up as the sole judge of its quality, and execute his own adverse judgment in his own way, and without restraint, in defiance of the company, and to its inevitable detriment. It has been held, that a rule of a water company, giving it the right to shut off water from the premises of a consumer who wastes it, is reasonable."

§ 59. **Same (continued).** Of course not all rules of water and gas companies are reasonable. In Shepard v. Milwaukee Gas Light Co. (19) the defendant refused to supply plaintiff with gas, unless he would agree to be bound by its regulations. This he refused to do. Service was accordingly denied and in consequence plaintiff sued for damages. Necessarily the court had to pass upon the reasonableness of these regulations. After affirming the defendant's right, in spite of its status as a public service company, to make reasonable regulations, and although holding some of the regulations, to which plaintiff was required to agree, to be reasonable and proper, the court held that some of them were unreasonable. One rule au-

(19) 6 Wis. 526.

thorized the company, by their inspector, to have free access at all times to buildings and dwellings, to examine the whole apparatus and for the removal of the meter and service pipe. This was held to be too general, the court observing that it certainly could not be necessary that the dwellings of gas consumers should be subject to instantaneous visitation at all times without notice. Another regulation reserved to the company the right at any time to cut off communication of the service pipe, if they should find it necessary so to do, to protect the works against abuse or fraud. This was vigorously condemned. Said the court: "Here the company assume the whole power to decide upon the question of abuse or fraud, either in fact or in anticipation, without notice, without trial, on their own mere motion. This summary jurisdiction would not be given to any of the judicial courts in any case, but upon the most urgent emergency. Much less could it have been the intention to confer such power upon one of the parties to a contract of such vital importance. It is no hardship for the company to resort to the same tribunals, upon like process, for protection against fraud, as the law provides for individuals." A third rule provided that the gas fittings must not be opened or disconnected for any purpose without the company's consent, and that any person violating such rule must pay the company treble damages for all damage thereby caused. This rule was condemned with equal vigor. "It is not to be allowed that the gas company can impose penalties in this way, or make the submission to such penalties a condition precedent to the right of the citizen to be furnished

with gas. It is singular if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without their assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so, and not him only, but upon any other person who should act in the matter without their consent. The statement of this proposition is its answer."

Section 3. Right to Contract.

§ 60. **Extent of right in general.** In most respects the right of a public servant to enter into contracts is essentially the same as that of any other person. Entering the public service involves neither gain nor loss of contractual capacity: if a natural person, he may still make whatever contracts are not forbidden by law; if a corporation, the public servant may, like other corporations, make whatever contracts are expressly or impliedly authorized by its charter. However, there is one class of contracts that may be lawfully made by a person in the exercise of a private calling that may not be made by one in the exercise of a public calling, one class of contracts that are forbidden to all public servants as such. We have seen that a person engaged in a public employment necessarily takes upon himself the performance of certain public duties. These duties are incidental to his calling; they are by law imposed upon him as a public servant. Since these duties are imposed by law, he cannot escape them by any act of his own. Therefore it follows that, so long as he remains in the public service, his right to con-

tract is subject to a limitation that does not exist in the case of private occupations. He cannot make a valid contract that is inconsistent with his duty as a public servant. To illustrate: he cannot make a valid contract with one person by which he agrees to deny service to another, when such service falls within the scope of his public undertaking; nor can he make a binding contract with one person, whereby he agrees to extend to him a preference that would amount to an unlawful discrimination against another member of the public; such contracts are clearly opposed to public policy. Subject to the general limitation that he may make no contract inconsistent with a recognition of his public duty, the public servant may contract as freely as any other person. Our inquiry must therefore be directed to an ascertainment of what contracts are by law deemed incompatible with the duties of public calling.

§ 61. Contracts limiting common law liability. The duty to serve the public, although peculiar to public servants, is by no means the only duty to which they are subject. Like all other persons, they are under the general duty not to harm others by their intentional or negligent conduct. With most public servants, as we have already seen, the liability stops here. They are liable for negligence but not for accident. They are in no sense insurers. Some, however, are practically insurers: in the exceptional cases of the innkeeper and common carrier there is liability for all losses of goods within their care, except such as are caused by the fault of the owner, the act of God, or of the public enemy. Public carriers of passen-

gers are also subject to the duty of extraordinary care. But whether subject to liability for ordinary negligence, to the duty of extraordinary care, or to the insurer's liability against all but excepted losses, persons in public employments frequently attempt by contract to avoid liability for all damage not intentionally caused. The validity of such contracts will now be considered.

§ 62. **Contracts relieving against insurer's liability.** The extraordinary liability of common carriers and innkeepers sometimes works great hardship. Recognizing this fact, the courts are ready, as we have seen, to uphold all reasonable rules that are intended to reduce to a minimum the probability of loss from this source. But are they ready to permit these public servants to make contracts with their patrons which will enable them to escape their insurer's liability altogether? In the absence of a statute restricting their common law liability it seems that they cannot escape it by the mere insertion of such a stipulation in the contract. For a reasonable compensation the shipper or traveler is entitled to this insurance as a matter of right, and, in the absence of a distinct consideration for the surrender of this right, such stipulation is of no effect. But suppose that there is no attempt to evade this liability altogether; suppose the applicant is given a choice of service under the insurer's liability for a reasonable compensation on the one hand, and service under the ordinary liability for negligence with a correspondingly less compensation on the other; would the acceptance of the latter alternative be void? Here there is a valuable consideration for the loss of insurance.

So long as there is a real choice and the terms offered are fair, there would seem to be no sound objection to permitting the applicant to assume the risk of loss from extraordinary causes himself. With respect to common carriers the right so to limit their liability is well established. The carrier and shipper may make a valid contract for limited liability at a reduced rate, provided the shipper be given a fair opportunity to have his goods carried under the full common law liability at a reasonable rate; although, owing to the fact the carrier usually has the shipper at a disadvantage, such contracts are subjected to very close scrutiny by the courts (20). With respect to innkeepers, the right to limit their liability in any degree seems doubtful, there being very little authority upon the point; but the analogy between the innkeeper's and common carrier's liability is so close that there seems little reason for denying the right to the former, while extending it to the latter, and it is probable that most courts would give the same treatment to both.

§ 63. **Contracts relieving common carriers from liability for negligence.** Most of the business of common carriage is done by corporations. As such they must act through agents and servants. The rule of law which makes the principal or master liable for the torts of his agent or servant, when acting in the scope of his employment, sometimes casts upon the corporation heavy burdens, although the immediate management may have been conducted with great care and extraordinary efforts may

(20) Little Rock & Ft. Smith Ry. Co. v. Cravens, 57 Ark. 112.

have been put forth to secure competent servants. As a result, such corporations frequently attempt to escape not only from their insurer's liability, but also from liability for the negligence of their own servants. Unless public employments are to be treated differently from private businesses, it seems clear that such a contract should be permitted. One man may license another to intentionally injure or even destroy his property. It follows that he may authorize him to negligently injure or destroy it. What he may authorize a natural person to do, he may also authorize a corporation to do. And what he may license at all, he may surely license by contract. Hence we should expect that a contract entered into between an owner of property and a person or corporation, whereby the latter is to be free from liability for the negligent injury or destruction of such property, should be upheld as a valid exercise of the owner's control of his property. Accordingly it has been held that a corporation may, in letting premises for the erection of a building, make a valid stipulation against liability resulting from fire which may be communicated to the building through the corporation's negligence (21). In such a contract the public has no special interest; public policy accordingly leaves the parties free to contract as they will. But the public does have an interest in the business of common carriers. In an individual case it might be of no public consequence that a shipper and carrier should agree that the latter should not be responsible for the negligent destruction of the former's goods by the lat-

(21) Griswold v. Ill. Cent. Ry., 90 Ia. 265.

ter's servants; but it might be a matter of serious consequence to the public, if railroads and other common carriers might by any means escape altogether from the consequences of their servants' negligence. In the interests of diligent and efficient public service, public policy may well condemn such a contract. This consideration and the obvious disadvantage of the ordinary shipper, when dealing with a railroad or express company, have led the courts in a great majority of jurisdictions to hold a common carrier's stipulation against loss from negligence as absolutely void (22).

§ 64. **Contracts fixing the measure of damages for loss or injury of goods by common carriers.** Although the courts frown upon attempts to free common carriers from all liability for losses resulting from their negligence, they are inclined to look with leniency upon a class of contracts which in many cases do practically result in a partial exemption from damages for such losses. It is well known that carriers charge a higher rate for transporting a parcel of great value, than one of equal weight and size of slight value. On its face such practice is reasonable and justified by the greater risk involved. If a shipper places a slight value upon goods, which are in fact of great value, and actually deceives the carrier into believing that they are of small value and therefore subject to a low rate, it is plain that the shipper should be bound by his declaration of value Again, if the goods are of uncertain value, it is obvious that the general principle, by which parties are permitted to liquidate dam-

(22) The Kensington, 183 U. S. 263.

ages by their contracts, ought to support a contract which is the result of an attempt fairly made by shipper and carrier to place a fair valuation upon the property in question. Such a valuation is universally upheld. Since, in the vast majority of cases in which the value is stipulated, the carrier either does not know what the value of the goods is, except as it is represented by the shipper, or else cannot be shown to have known that the agreed valuation was unreasonable, it follows that such stipulations will ordinarily be controlling. On the other hand, if the goods are clearly and obviously of great value, it is plain that to allow the parties to agree upon a small sum by way of liquidated damages would amount to permitting them to contract against the carrier's liability for negligence. At this point the line is drawn by the decisions. The carrier may safely rely upon the shipper's declaration of value when he does not know the real value; the carrier and shipper may in good faith make a binding contract which attempts to fix a reasonable value upon the goods offered for shipment; but they may not make a binding contract when they deliberately place an unreasonably low value upon them in order to evade the rule against limitation of liability for negligence (23).

§ 65. **Attempts of passenger carriers to escape liability for negligence.** How far one person may authorize another to inflict a negligent personal injury upon him, under ordinary circumstances, is very uncertain. He cannot lawfully authorize him to inflict an intentional personal injury upon him. And the same public interest

(23) Railway Co. v. Jones, 132 Ala. 437.

in the life and safety of every human being, that renders him incapable of giving a valid consent to such an intentional injury, would also seem to forbid a contract intended to authorize another to injure him negligently. If that other may act only through servants, as in the case of a corporation, the condemnation may be less clear, especially in a case in which he is in need of the corporation's services; and yet, even here, that same public policy, which so highly values the life and safety of the members of the public, would seem to forbid any relaxation of the law which does so much to secure care in the selection of corporation servants. In a word, it seems doubtful whether any contract can be justified on principle by which it is provided that, in the case of a serious physical injury of one contracting party by the other's negligence, the party guilty of negligence shall be free from liability. Hence we should expect that the carrier of passengers, whether public or private, should be unable to provide by valid contract against liability for the negligent physical injury of his passengers. And such indeed seems to be the law. In New York a public carrier may protect himself from liability for his servant's negligence (23a); but this is opposed to the great weight of authority (24). In some states he may by contract reduce the amount of care which he owes, but all attempts to limit liability for negligence to passengers are disapproved by most jurisdictions (25). In some cases it has been held that a person riding upon a pass, which contains a stipulation that

(23a) Stinson v. N. Y. Cent. Ry., 32 N. Y. 333.
(24) Railroad Co. v. Lockwood, 17 Wall. 357.
(25) Griswold v. N. Y. etc. R. Co., 53 Conn. 371.

the carrier will not be liable for his personal injury through the negligence of its servants, assumes the risk and cannot recover for an injury so resulting (26); but, even in the case of gratuitous carriage, many cases hold that no power of exemption exists (27). The general policy of the law with reference to stipulations against liability for negligence on the part of public carriers is well stated by Mr. Justice Bradley in the leading case of Railroad v. Lockwood (28): "Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

(26) Quimby v. Boston etc. R. Co., 150 Mass. 365.
(27) Jacobus v. St. P. & C. R. Co., 20 Minn. 110.
(28) 17 Wall. 357.

PART II.

CARRIERS.

§ 66. **Kinds of carriers.** A carrier is one who undertakes to transport persons or property from place to place. He may be either a private carrier or a public carrier. A private carrier is one who carries under a special agreement and not in accordance with a public profession. The farmer who for a consideration hauls his neighbor's corn to market is a private carrier. A public carrier is one who makes a business of carrying persons or property for hire, in accordance with a public profession. If his public profession is restricted to the carriage of persons, he is simply a carrier of passengers. The street-car company is a familiar example. If his public profession is restricted to the carriage of goods, he is technically a common carrier. Such a carrier is the village drayman. Of course the same person may be both a carrier of passengers and a common carrier. The railway company is a notable illustration. Sometimes the term common carrier is used as the equivalent of public carrier. Thus the railroad is said to be a common carrier of goods and passengers. But historically the term has the more restricted meaning.

§ 67. **Scope of treatment.** All public carriers are engaged in the business of serving the public. As public

servants they are subject to the obligations that have been discussed under the head of Public Service Corporations, Part I, above. They are therefore bound to render equal service to all without unjust discrimination, and are entitled to reasonable compensation for their services, to make reasonable rules and regulations, and to contract subject to no restrictions save those imposed by the law. These rights and liabilities of a general character having been fully treated in Part I, will not be re-examined here. But, as we have already seen, much of the law that is applicable to public servants is by no means applicable to all public servants; much of it is peculiar to particular public servants. Just as they differ among themselves in the kinds of service rendered, so they differ from each other in the concrete situations, facts, and circumstances, to which the conduct of their business gives rise. It follows that every public service calling presents its own particular problems to the courts. Necessarily every such occupation becomes subject to rules more or less peculiar to itself. Space forbids a treatment of the law that is peculiar to all the different public callings; but the supreme importance of the business of public carriage, as well as the large body of law that is peculiar to that business, necessitates a special treatment of the law applicable to public carriers. Private carriers are governed by the rules applicable to bailees for hire; but public carriers may fairly be said to be controlled by a highly specialized branch of the law of public callings.

CHAPTER V.

COMMON CARRIERS OF GOODS.

SECTION 1. WHO ARE COMMON CARRIERS?

§ 68. **Definition.** In Gisbourn v. Hurst (1), a leading English case, a common carrier is defined as "any man undertaking for hire to carry the goods of all persons indifferently." The definition which has most often received judicial sanction in this country is that of Parker, C. J., in Dwight v. Brewster (2). According to him a common carrier is "one who undertakes to transport the goods of such as choose to employ him, from place to place."

§ 69. **Necessity of public employment.** The definitions above stated require of the common carrier an undertaking to serve the public. The nature of this undertaking is thus stated by Judge Story: "To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation" (3). A

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(1) 1 Salk. 249.
(2) 1 Pick. 50.
(3) Story on Bailments, sec. 495.

few cases have denied the necessity of a public profession, but the great weight of authority accords with the view that to be a common carrier one must engage in the carriage of goods as a public business (4). A leading case is Allen v. Sackrider (5). The defendants owned a sloop, but they were not in the business of carrying goods. They had never offered their vessel to the public or to individuals for use. At the plaintiffs' request, defendants had carried a cargo of grain on the sloop on one occasion. Some months later the plaintiffs again asked the defendants to make a similar trip for grain. The defendants consented, a price was agreed upon, and a cargo of grain was loaded. Without negligence on the part of the defendants, the vessel was driven ashore and the cargo seriously damaged. The defendants' liability depended entirely upon the defendants' status as carriers: if private carriers, they were not liable in the absence of negligence; if common carriers, they were liable regardless of their exercise of care. It was held that they were private carriers. Said Parker, J., in delivering the opinion of the court: "The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs at their special request. Nor does it appear that the defendants were engaged in the

(4) 1 Hutchinson on Carriers (3d ed.) sec. 57.
(5) 37 N. Y. 341.

business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers."

§ 70. **Extent of undertaking.** The extent of the common carriers' undertaking is determined by his public profession. Ordinarily, and in the absence of statutory requirements or of special privileges, his actual facilities limit the amount of business which he is required to do. Ordinarily he is free to select the route over which he will travel or act as carrier, and if, in an individual instance, he goes without that route he may be acting as a private carrier. So, too, he may be a common carrier as to certain classes of goods only; in such case, if he carries goods which are not of the kind which he holds himself out to the public as undertaking to carry, he acts as a private carrier and is responsible as such. That a special undertaking, without the scope of the public profession, is not that of a common carrier is well illustrated by a leading case (6). The plaintiff had a large circus and menagerie property and special cars for their carriage. He contracted with the defendant railroad for the hauling of his cars by train of one or two divisions; the defendant to furnish the motive power and trainmen; the train to run on special time and to stop as provided by the contract; the train to be operated under the general control of the plaintiff, but according to the rules of the defendant; and the plaintiff to load and unload the cars.

(6) Coup v. Railway Co., 56 Mich. 111.

Under this contract it was sought to hold the defendant as a common carrier for damage to plaintiff's property. The court held that, as to this undertaking, the defendant was not a common carrier, relying upon the absence of a public duty to make up special trains on demand, or to drive such trains made up entirely by other persons or their cars, or to assume the burden and risks of carrying wild animals.

§ 71. **Carriage must be for hire.** A common carrier may in a particular case carry goods gratuitously, but in doing so he does not act as a common carrier. It is obviously unfair that the strict liability of the common carrier should be laid upon one who carries another's goods without compensation. But the agreement for compensation need not be express; in the absence of circumstances showing an intent to carry without charge, an agreement to pay the reasonable value will be implied from the request for service, followed by the carriage requested. Indeed, a carriage for hire will sometimes be inferred from a course of dealing, in spite of an express contract which stipulates for gratuitous carriage. Thus where grain was shipped in sacks and it was expressly agreed that the empty sacks were to be returned by the carrier without charge, it was held that he was a common carrier in returning the empty sacks, since he did not in fact carry them gratuitously but was paid for that service in the money which was nominally paid for the carriage of the grain only (7).

(7) Pierce v. Railway Co., 23 Wis. 387.

§ 72. **Method of carriage immaterial.** The development of industry results in new forms of carriage. As a consequence, the list of common carriers known to the law is from time to time lengthening. The primitive common carrier of England seems to have carried by pack-animals. Nowadays we instinctively think of railways and steamships as typical common carriers. But it is obvious that the means of transportation is immaterial. So the courts have held that express and transportation companies, transfer companies, truckmen, draymen, public carriers by boat or vessel, including the ferryman and lighterman, as well as the ship-owner, are all common carriers. But the owner of the towboat is not a common carrier; he does not carry but furnishes motive power (8). Nor is the bridge, canal, or turnpike company a common carrier; merely to provide a thoroughfare is not to carry (9-10). Although the method of carriage is immaterial, there must nevertheless be actual carriage.

Section 2. Liability of Common Carrier.

§ 73. **In general.** The common carrier is of course liable for all damage which he intentionally causes by his wrongful act or omission. It is equally plain that he is liable for all damage which is in a legal sense caused by his negligence. If his liability stopped here, we should find him under the duty of exercising care to secure prompt and safe transportation; this duty faithfully performed, any delay, loss, or damage to goods would be the owner's misfortune, for which the carrier would not be

(8) Wells v. Steam Nav. Co., 2 N. Y. 204.

(9-10) 1 Hutchinson on Carriers (3d ed.), sec. 103.

deemed responsible. With respect to mere delay in transportation, this seems to mark the extent of the carrier's liability; but, with respect to loss or damage to goods, the law imposes upon the common carrier a liability approaching that of an insurer. He is indeed absolutely liable, without regard to negligence, for all loss or damage to goods while in his possession as carrier, unless such loss or damage be caused by the act of God, the public enemy, the government, the shipper, or the inherent vice of the goods themselves. The extent of his liability is therefore marked by the limits of these exceptions.

§ 74. **Liability for loss caused by act of God.** For loss or damage resulting from the act of God the common carrier is not liable. The act of God is a natural force operating without human agency. Obvious illustrations are lightning, earthquake, tornado, flood, and snow-storm. But a fire or explosion, although not caused by negligence, cannot be deemed an act of God, unless it results from lightning or spontaneous combustion, since human agency must have contributed to its production. It is entirely immaterial that the human agency is unconnected with the carrier himself. For this reason a carrier was held liable for goods destroyed in the great Chicago fire (11). So, if reasonable foresight and care on the carrier's part would have avoided exposing the goods to danger from the act of God, the carrier will be liable. Thus, a railroad which accepted goods for carriage, over a line known to be flooded, was held liable for damage to the goods caused by the flood (12).

(11) Merchants' Despatch Co. v. Smith, 76 Ill. 542.
(12) Adams Express Co. v. Jackson, 92 Tenn. 326.

§ 75. Loss caused by public enemy. Another historical exception to the insurer's liability of the common carrier is loss or damage caused by the public enemy. By this is meant that, if goods are taken or injured by any enemy of the carrier's country, the carrier will be excused. The limits of this exception depend upon the definition of "enemy." Obviously, the armed forces of an established state at war with the carrier's country are within the meaning of the word. Obviously, too, mere thieves or outlaws are not. Even mobs or rioters are not so classed (13). Insurrectionists are not within the meaning of public enemy, but rebels who have been recognized as belligerents constitute a public enemy. A carrier is not liable for goods destroyed by rebels against his country who have the status of belligerents (14). On the other hand, if the carrier cperates under a recognized de facto government set up by forces in rebellion, the carrier will not be liable for goods destroyed by fcrces of the country against which the rebellion is directed (15). Pirates are regarded as hostile to all governments, and therefore as enemies of the carrier's country.

§ 76. Loss caused by carrier's government. Just as the carrier is excused for loss or damage caused by his country's enemy, so he is excused when the loss or damage arises from the act of the government under which he does business. To excuse him, it will not be enough that the loss is occasioned by his voluntary assistance of the

(13) Coggs v. Bernard, 2 Ld. Raymond, 909.

(14) Bland v. Adams Express Co., 1 Duvall, 232.

(15) Southern Express Co. v. Wornack, 1 Heisk. 256.

government, as where he has broken a contract of carriage in order to tender a vessel to the government for its use (16); the loss must result from the compulsory mandate of the paramount political power, as where goods are surrendered to an officer who demands them under process regular on its face. As in the case of the public enemy, it is sufficient that the government have the status of a de facto government. Thus, a carrier within the jurisdiction of the Confederate government was held not to be liable for property destroyed by its act (17).

§ 77. Loss caused by the fault of the owner or shipper. Although the carrier cannot escape liability on the ground that a third person has caused the loss or damage, a different rule prevails where the owner or shipper himself is at fault. Here, as elsewhere, a man cannot recover for damage which he himself or his authorized agent has caused. Thus, the owner of a horse, which was being carried in a railway car, could not recover for the death of the animal, where it appeared that the death resulted from the horse's escape through a car window, which the owner, without the knowledge of the carrier, had left open (18). So, where a package contains articles of a fragile nature, but no notice thereof is given to the carrier, it has been held that the shipper's want of care, in failing to warn the carrier of the need of great care, exonerates a carrier where the latter has used ordinary care (19). A loss resulting from a misdirection of the

(16) Graves v. S. S. Co., 61 N. Y. Supp. 115.
(17) Nashville R. Co. v. Estes, 10 Lea, 747.
(18) Hutchinson v. Railway Co., 37 Minn. 524.
(19) American Exp. Co. v. Perkins, 42 Ill. 458.

shipper is similarly treated (20). Where the shipper, in order to secure a lower rate, conceals the fact that a package contains goods of great value and leads the carrier to believe that the value is slight, and the goods are subsequently lost while in the carrier's possession, recovery is barred by the shipper's fraud (21).

§ 78. **Loss caused by inherent nature of goods.** Some kinds of property contain within themselves the elements of their own destruction, or are of such a nature as to be peculiarly subject to injury from the operation of natural forces, or the inevitable movements of transportation. Where loss results from this cause only, the carrier is not liable. Where, for instance, he carries berries, fruits, or vegetables, in the observance of all reasonable precautions, he is not liable for their natural decay. Live animals constitute perhaps the most important class of property that is especially subject to injury from inherent tendencies. In a leading case, in which recovery was sought for the injury of a horse in course of transportation, the principles governing this exception were thus stated by Bramwell, B.: "No doubt the horse was the immediate cause of its own injuries, i. e., no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, its proper vice, that is from fright or temper or struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendant's negligence or any misfortune

(20) Cougar v. Railroad Co., 24 Wis. 157.
(21) Gibbon v. Paynton, 4 Burr. 2298.

happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line through some obstruction maliciously laid upon it, then the defendants, as insurers, would be liable. If perishable articles, say soft fruits, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable'' (22).

§ 79. **Loss during deviation from agreed route.** The exceptions to the insurer's liability of the common carrier apply when the carrier sends the goods over the usual, customary, or specified route, or deviates therefrom necessarily. In case of unnecessary deviation, he becomes an insurer against all loss from whatever source. Thus, where goods were lost in consequence of a storm which occurred while defendant's vessel was unnecessarily out of the usual course of the voyage, the act of God was no defence (22a). And where goods routed by fast freight were shipped by steamship, it was held that the defendant was liable absolutely and that the cause of the loss was immaterial (23).

§ 80. **Liability as affected by statute or contract.** In a few states, the strict liability of the common carrier is modified by statute. On the other hand some states have passed acts forbidding common carriers to limit their liability as insurers, even by express contract. But, as

(22) Kendall v. Railway, L. R. 7 Exch. 373.

(22a) Davis v. Garrett, 6 Bing. 716.

(23) Railroad v. Beck. 125 Pa. St. 620.

we have already seen (24), most courts, in the absence of statute, hold that a common carrier may by express contract restrict its liability to that of an ordinary bailee for hire, thereby becoming liable only for loss or damage resulting from the carrier's wrong or negligence. As a matter of fact, most shipments are made under this limitation. The uniform bill of lading, now so generally used, exempts the carrier from liability for damage resulting from "causes beyond its control"; but, if the shipper insists upon the full common law liability, he may have his goods carried in accordance therewith, upon paying an additional compensation.

Section 3. Duration of Common Carrier's Responsibility.

§ 81. **When responsibility begins.** As a public servant, the common carrier is bound to serve all and is therefore liable for a refusal to carry for any member of the public who tenders goods for carriage, when they are of a kind which the carrier holds himself out as ready to carry, and the tender is accompanied by an offer to pay the reasonable charges for the carriage (25); but he does not become liable as an insurer against loss or damage, until he takes possession of the goods as carrier for the purpose of immediate transportation. Such possession requires both delivery by the shipper and acceptance by the carrier. Of course acceptance may be made by the carrier himself or by his agent; if by his agent, it is important that the agent have authority to accept—an acceptance

(24) § 62, above.
(25) See §§ 16-17, above.

of freight by the master would bind the owners of the vessel, but an acceptance by a member of the crew would not. If the goods are actually accepted, the place of delivery is immaterial. On the other hand, it will not be enough to place goods in a convenient or customary place without notice to the carrier, unless indeed the carrier himself, either by express notice or by customary usage, has indicated that so placing them will constitute a delivery and acceptance. The carrier's risk begins when the goods are actually taken into the carrier's possession, and not when the receipt is issued. Thus, a railroad was held liable as carrier for goods destroyed after they had been received on cars on a side-track, in accordance with custom, but before a bill of lading had been issued (26). Conversely, a railroad was held not to be liable as carrier, where goods were destroyed after the issuance of a bill of lading but before actual delivery (27).

§ 82. **When responsibility ends.** Just as the common carrier's responsibility begins when the property is taken into his possession, so it ends when delivery is made to the consignee. Delivery may of course be made either to the consignee himself or to his authorized agent. As to where delivery should be made, much depends upon usage. The transfer company delivers baggage wherever the owner directs. The express company usually delivers packages to the consignee's residence or place of business, in the absence of specific directions. The railway company, owing to its mode of carriage, cannot make a

(26) Ill. Cent. R. Co. v. Sneyser, 38 Ill. 354.
(27) Amory Mfg. Co. v. R. Co., 89 Tex. 419.

house to house delivery; by universal custom it makes delivery at its depot, or, in special cases, in cars set out on side-tracks. Where goods are to be delivered at the carrier's depot, there is much controversy as to when the carriage is complete. By the so-called "Massachusetts rule" the carrier's liability as insurer ceases when he has safely placed the goods in his depot or upon its platform; he is then liable as a warehouseman only, and therefore not liable for loss or damage occurring otherwise than as a result of his negligence (28). By the "New Hampshire rule" he remains liable as insurer until the consignee has had a reasonable time for receiving the goods after their arrival (29). By the "New York rule" the consignee is not only entitled to a reasonable time in which to remove his goods, but is also entitled to what is, under the circumstances, a reasonable notice of their arrival (30). These several rules are each supported by various jurisdictions. In some cases the carrier's responsibility terminates before delivery, or even before the goods have arrived at the station. This is the case when the consignor has exercised the right of stoppage in transitu (31); when the property has been lost through the act of God or other cause for which the carrier is not responsible; and where the goods have been delivered to one who claims under a superior title (32), or seized by an officer under valid legal process (33).

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(28) Thomas v. Railroad Co., 10 Md. 472.

(29) Moses v. Railroad, 32 N. H. 523.

(30) Fenner v. Railroad, 44 N. Y. 505.

(31) See Sales, §§ 99, ff. in Volume III of this work.

(32) Express Co. v. Hammer, 21 Ind. App. 186.

(33) Bliven v. Railroad Co., 36 N. Y. 403.

§ 83. **Responsibility for goods in possession of connecting carrier.** What has been said as to the ending of the carrier's responsibility has been on the assumption that the undertaking was to carry over one line. Frequently, as in the case of railroads, goods must be sent over the lines of two or more connecting carriers. Suppose the goods are lost or damaged while in the possession of one of them. Is that carrier alone responsible; is the initial carrier also responsible; or is the responsibility shared by all the carriers? This question may be and usually is answered by the contract of carriage. Thus the uniform bill of lading expressly provides that no carrier shall be responsible for damage not occurring on its road. But the contract of carriage may be silent on this point. In such case it is held in a few American jurisdictions, which follow the English rule, that it is to be presumed that the initial carrier has undertaken to be responsible as principal for the entire carriage, and is therefore to be held liable for loss or damage occurring while the goods are in the possession of any subsequent carrier, the latter being treated as the first carrier's agent (34); but the so-called American rule, adopted by the majority of our jurisdictions, makes the initial carrier liable for loss or damage occurring upon his own line only. With respect to connecting carriers, he is treated as being the agent of the shipper (35). This rule sometimes creates difficulties for the shipper, for it may be doubtful as to when the loss occurred; but the hardship

(34) B. & O. R. R. Co. v. Campbell, 36 Oh. St. 647.
(35) Myrick v. R. R. Co., 107 U. S. 102.

is partly overcome by the rule that goods found damaged in the possession of a carrier are presumed to have been damaged by that carrier in the absence of evidence to the contrary (36).

(36) Morganton Mfg. Co. v. Ry. Co., 121 N. C. 514.

CHAPTER VI.

PUBLIC CARRIERS OF PASSENGERS.

Section 1. Carrier of Passengers Compared with Carrier of Goods.

§ 84. **With respect to the public service.** As regards the usual rights and duties of public servants, there is no substantial distinction between the two classes of public carriers. Each is engaged in a public calling, and must therefore serve the public to the full extent of his undertaking without unjust discrimination. For this service each is entitled to charge a reasonable compensation, and to exact its payment before the carriage begins if he so desires. Like other public servants, each may make reasonable rules and regulations for the conduct of his business. Indeed, the points of resemblance are so strong that they are often classed together as common carriers. But there are important differences, as will presently appear.

§ 85. **With respect to control.** The carrier of goods has possession of the thing carried; he may put it where he will, under lock and key if need be, exercising what precautions he chooses to secure its safety. But the passenger carrier does not have possession of his passengers. Each of them retains in large measure his freedom of movement. However, the passenger carrier does have

possession and control of his vehicles and means of carriage. This and his right to make reasonable regulations does give him a qualified control of his passengers.

§ 86. **With respect to liability for injuries.** The most important difference between the two great classes of public carriers is in respect to their liability for injuries during carriage. The common carrier of goods, having full and complete control and possession of goods unaccompanied by their owner, had abundant opportunity for fraudulent practices and especially for collusion with the robbers and highwaymen of the English roads. Hence public policy favored the insurer's liability of the common carrier. But the absence of this full control, and the passenger's ability to care for himself, made such extreme liability unnecessary as well as unfair to the carrier of passengers. Hence, he was not treated as a warrantor of the passenger's safety; he has never been regarded as absolutely liable without regard to negligence. On the other hand, as one into whose care the safety of human life is so often entrusted, he must needs exercise a very high degree of care. Public safety demands and consequently the law requires that he provide for the safety of his passengers "as far as human care and foresight will go" (1).

§ 87. **With respect to carriage for hire.** We have seen that the insurer's liability of the common carrier does not arise unless the goods are being carried for hire; that one who is carrying goods gratuitously is not, with respect to such goods, a common carrier. It is otherwise

(1) Christie v. Griggs, 2 Camp. (Eng.) 79.

as to the extraordinary liability of the carrier of passengers. One may be received as a gratuitous passenger; toward such a passenger the carrier owes as great a duty of care as toward the passenger who has paid the regular fare in full (2).

§ 88. **With respect to limitation of common law liability.** We have seen that, in the absence of statute, most courts allow the common carrier to escape his insurer's liability and to become liable only for negligence, by special provision in the contract of carriage. May the passenger carrier, by a similar provision, escape his common law duty to exercise extraordinary care? It seems not. It is one thing to uphold a contract whereby the owner of goods surrenders, for a sufficient consideration, his common law right to the carrier's insurance against losses occurring without the latter's fault; it is quite another thing to uphold a contract whereby the passenger surrenders his right to be carried with a high degree of care. Public policy speaks clearly for all that concerns the safety of human life; it is accordingly deemed by many courts to forbid a contract whereby a public carrier seeks in any degree to escape his duty to provide for the safety of a passenger (3). Some courts permit him to limit his liability to such injuries as result from his want of ordinary, as distinguished from very great, care (4). A few courts take a distinction between the negligence of the carrier and that of his servants, forbidding the carrier to stipulate against liability for the re-

(2) Railroad Co. v. Derby, 14 How. 468.

(3) Jacobus v. R. Co., 20 Minn. 125.

(4) Ill. Cent. R. Co. v. Morrison, 19 Ill. 136.

sults of his own negligence, but permitting him to contract against liability for his servants' negligence (5). And a few courts recognize a distinction in this respect between carriage for hire and carriage that is gratuitous (6).

Section 2. Who Is a Passenger?

§ 89. **Definition.** As remarked by a court in deciding a recent case, it is not easy to construct a definition of the term "passenger," which, on the one hand, includes all persons entitled to the rights of passengers, and, on the other, excludes all those who are not (7). But the following definition is more frequently adopted than any other: "A *passenger* is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor" (8). A person answering this description is undoubtedly a passenger; but one may be a passenger without coming wholly within its terms. One may be a passenger, so far as the carrier's liability is concerned, before he reaches the conveyance or after he leaves it. And he may also be a passenger, although he neither pays nor promises to pay money or its equivalent. But, for most practical purposes, the definition suffices.

§ 90. **When the relationship of carrier and passenger begins.** It is obvious that one who, after having paid his fare, is actually riding upon the carrier's conveyance, has

(5) Stinson v. N. Y. Cent. R. Co., 32 N. Y. 333.
(6) Quimby v. Boston, etc. R. Co., 150 Mass. 365.
(7) Rawlings v. R. Co., 97 Mo. App. 515.
(8) Pennsylvania R. Co. v. Price, 96 Pa. St. 267.

become a passenger. It is almost equally obvious that he need not have paid his fare, provided he has expressly or impliedly agreed to pay it, as where one is riding upon a street-car before the conductor has collected his fare. It is also quite obvious that the conveyance need not be in motion, if he has taken his place upon it in accordance with the carrier's directions. But he need not have taken his place upon the conveyance. One who is attempting to step upon a street-car platform, intending to take passage, is a passenger (9); but one who has signaled a car to stop has not by so doing become a passenger, although the driver saw the signal and intended to stop (10). So one who enters upon depot grounds for the purpose of becoming a passenger upon the carrier's train, in the regular course of business, is also a passenger (11); but one who is walking toward the station with such an intention has not yet become a passenger (12). These instances seem to bear out the following language of a Massachusetts case with reference to the circumstances from which the existence of the relation of passenger and carrier may be implied: "These circumstances must be such as to warrant an implication that the one offered himself to be carried on a trip about to be made, and that the other has accepted the offer, and has received him to be properly cared for until the trip is begun, and then to be carried" (13).

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(9) Smith v. St. Paul Ry. Co., 32 Minn. 1.
(10) Donovan v. Hartford St. Ry. Co., 65 Conn. 201.
(11) Allender v. C. R. I. & P. Co., 37 Iowa, 264.
(12) June v. B. & A. R. Co., 153 Mass. 79.
(13) Webster v. Fitchburg R. Co., 161 Mass. 298.

§ 91. **When the relationship ends.** The relationship ordinarily continues until the passenger has reached his destination. While passing from one train or car to another, in accordance with the contract of transportation, for the purpose of continuing his trip a passenger does not lose his rights as such (14). Nor does he cease to be a passenger upon temporarily leaving the conveyance for a reasonable purpose, without an intention to abandon the transportation (15). But, upon leaving the conveyance with such an intention before his destination is reached, as where he gets off a train while it is still in motion upon approaching his destination, he does lose his rights as a passenger (16). A passenger on a street-car or other conveyance, which does not land passengers at a regular station, ceases to be a passenger the moment he leaves the car and steps into a public street (17). But, when the carrier maintains a regular station for the use of its passengers, the relationship continues until he has had a reasonable opportunity to leave the premises. Thus, it was held that the relationship continued while a passenger was leaving a station, upon an approach which was upon the railway premises and was maintained for the convenience of persons going to and from the station (18). But, where a person had alighted from his train, left the station, and passed upon the sidewalk of a highway, the relationship was held to have ceased (19).

(14) B. & O. R. Co. v. State, 60 Md. 449.
(15) Watson v. Land Co., 92 Ala. 320.
(16) Commonwealth v. R. R., 129 Mass. 500.
(17) Cramer v. West End St. Ry. Co., 156 Mass. 320.
(18) Gulf, C. & S. F. Ry. Co. v. Glenk, 9 Tex. Civ. App. 599.
(19) Allerton v. B. & M. R. R. 146 Mass. 241.

Of course the passenger cannot, by remaining upon the train an unreasonable length of time after his destination is reached, continue the relationship after the expiration of such time (20). Nor may he claim a passenger's rights where he loiters about the station after his journey is ended. And where, on account of a passenger's misconduct, refusal to pay fare, or to show his ticket, or other circumstances justifying his expulsion, the carrier ejects the passenger from his conveyance, the relationship is thereby terminated (21).

§ 92. **Particular instances considered.** Not every person who rides on a carrier's conveyance is a passenger, although he may have intended to become one. We have seen that the payment of fare is unnecessary, where the carrier intends to accept a person as a gratuitous passenger, but ordinarily no such intention is present; and where a person is riding with a fraudulent intent to avoid paying for his passage, as by representing that he is the person entitled to be carried upon a non-transferrable ticket, he is not a passenger (22). So, even in the absence of fraud, a carrier may refuse to accept as a passenger one riding upon a non-transferrable ticket when he attempts to use it as a transferee (23). The carrier may also refuse to accept as a passenger one who has boarded a train upon which his ticket does not entitle him to travel, as where he attempts to use a second-class ticket upon a

(20) C. etc. R. Co. v. Barrett, 16 Ill. App. 17.
(21) Hurt v. So. R. Co., 40 Miss. 391.
(22) Louisville etc. R. Co. v. Thompson, 107 Ind. 442.
(23) Chicago R. Co. v. Bannerman, 15 Ill. App. 100.

train limited to first-class passengers (24). Sometimes one travels upon a carrier's vehicle which is not ordinarily used for carrying passengers. If the carrier accepts him as a passenger upon such a vehicle, the fact of its unusual character is, of course, immaterial (25); but, under ordinary circumstances, one riding upon such a conveyance, as for instance, a locomotive (26), a hand-car, or a construction train is not deemed to be a passenger. The carrier does not hold itself out as a carrier by such vehicles.

Section 3. Passenger's Baggage.

§ 93. **What constitutes baggage.** Baggage has been defined as "whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey" (27). Under this definition, merchandise or other articles intended for trade and commerce are not included, since they are not to be used by the passenger upon his journey (28); but a carpenter's tools which he carried with him from place to place have been held to constitute baggage (29). Similarly, a large sum of money being carried for business or commercial purposes is not deemed to be baggage, although a small sum carried for the purpose of meeting expenses incident to the journey has been held to come

(24) N. Y. etc. R. Co. v. Bennett, 50 Fed. 496.
(25) Rosenbaum v. St. Paul, etc. R. Co., 38 Minn. 173.
(26) Chicago, etc. R. Co. v. Michie, 83 Ill. 427.
(27) Macrow v. R. Co., L. R. 6 Q. B. 612.
(28) Collins v. B. & M. R. Co., 64 Mass. 506.
(29) Porter v. Hildebrand, 14 Pa. 129.

within the meaning of the term (30). Although articles not intended for the passenger's use on the journey are not regarded as baggage, baggage is by no means restricted to necessities. Accordingly, a watch and chain for the passenger's convenience (31), jewelry for the passenger's adornment (32), and articles for his amusement, such as guns for sporting purposes (33), have all been held to be included within his baggage.

§ 94. **Carrier's duty with respect to baggage.** It is the duty of the carrier to transport a reasonable amount of baggage for each of his passengers. This baggage may remain in the custody and control of the passenger as hand-baggage, in which case it is not really baggage in the technical sense, and the carrier's liability therefor does not go beyond responsibility for loss or damage caused by his negligence; or, the baggage may, as is always the case with the larger pieces of baggage like trunks, be taken into the possession of the carrier, in which case it becomes baggage in the technical sense (if the constituent articles may constitute baggage), and the carrier becomes liable therefor as an insurer, in the sense that a common carrier is so liable. He may limit this liability, by contract, to the same extent as that the common carrier of goods may limit his. In other words, the public carrier of passengers is, as to the passenger's baggage, a common carrier of goods (34).

(30) Jordan v. Fall River R. Co., 59 Mass. 69.
(31) Railroad Co. v. Kennedy, 41 Miss. 671.
(32) Ry. Co. v. Hammond, 33 Ind. 379.
(33) Van Horn v. Kermit, 4 E. D. Smith, 453.
(34) Woods v. Devin, 13 Ill. 746.

APPENDIX A

PARTNERSHIP.

§ 2. Smith carried on the business of a stationer. Jones lent him a sum of money and it was agreed by them that Jones should receive a certain part of the profits each year until the money should be repaid. Smith failed in business and his creditors sought to hold Jones liable for the debts on the ground that he was a partner. What decision?

§ 8. Several individuals organize an athletic club and in order to obtain money for the purchase of uniforms and equipment, they charge admission to their contests. The receipts from their contests are given to their treasurer, who pays their bills and deposits any surplus in their treasury. Is the club a partnership.

§ 9. Two persons propose to form a partnership, and in pursuance of their purpose, they employ a lawyer to prepare articles of partnership. Before the articles are signed they embark in the business and contract debts. Are they liable as partners?

§ 12. Several individuals form a partnership and carry on business under a firm name, and afterwards, for the purpose of carrying on the same partnership business, they incorporate under the same name. Do they cease to become partners?

§ 20. The Salvation Army appoints a committee to make arrangements for its Annual Free Christmas Dinner. Can the members of the committee be held liable as partners for debts contracted in hiring a hall and making other arrangements?

§ 22. Has a member of a firm engaged in the business of manufacturing steel rails implied authority to issue promissory notes in the firm name?

Distinguish between a special partnership and a special partner.

§ 25. An infant and an adult engage in the grocery business as partners, the infant's share of the income derived from the business being his only means of support. Is he liable for their debts?

§ 27. If a member of a firm becomes insane does the partnership terminate?

§ 28. May a firm enter into partnership with another firm? With an individual? May a corporation be a member of a firm?

What is a sub-partnership?

§ 29. Cole & Black are members of a trading firm. The articles of partnership provide that neither partner shall have power to sign notes for the firm. Cole signs a note in the firm name which gets into the hands of Scott, who is ignorant of the provisions in the articles of partnership. Is the firm liable on the note?

§ 34. James P. Smith, a man of considerable wealth, and another do business as partners under the firm name of J. P. Smith & Co. Smith sells out his interest to his daughter-in-law. The business is continued under the firm name of J. P. Smith and Co., the "J." in the new firm standing for Julia. Williamson extends credit to the new firm believing that James P. Smith is still a partner. The firm and both partners become insolvent. Can Williamson recover from James P. Smith?

§ 36. Brown and Jones argee between themselves that they will not become partners. They hold themselves out to the world as partners. Are they in fact partners? Does this holding out as partners affect the extent of their individual liability to third persons for debts contracted in the interest of the business?

§ 37. What is the effect of a deed of land to a firm in the firm name?

§ 39. What is meant by the good will of a partnership?

§ 40. Williams and White are partners in the automobile business. It is White's duty to test out the new machines. He secretly takes parties with him for two dollars per hour while thus testing. Is Williams entitled to a share of the money thus received?

§ 44. Two partners of three engaged in the real estate business attempt to transform the firm into a grocery store. Can this be done without the third partner's consent?

§ 46. Jones, a firm creditor, has a claim for $100. Smith has a claim against one of the partners for $100. The firm becomes insolvent. There are $20 firm assets. The partners have nothing. How much do Smith and Jones get?

§ 47. Watkins and Roland are engaged in business as partners. While Roland is in Europe the firm is sued for a breach of contract and judgment entered against it. The capital of the firm being insufficient, Watkins pays the judgment with his own money. Has he any remedy against Roland?

§ § 51, 52. Adams and Wilkins are partners in one business; Wilkins and Cox in another. The latter firm owes the former but refuses to pay because Wilkins contends that the firm of Wilkins

and Cox owes him, and Adams has already so much overdrawn his account in the firm of Adams and Wilkins that the claim, if paid, would properly belong to Wilkins. Can Adams compel the firm of Wilkins & Cox to pay?

§ 55. Land is acquired on firm account with firm funds, but title is taken in name of Waters, who is one of the partners. Waters dies. Who has title to the land?

§ 56. Johnson and Mahon are partners in the hardware business. Johnson orders a delivery wagon from Babcock. The firm engages exclusively in a mail order business, selling only to out-of-town customers, and has no use for a delivery wagon. Is the firm liable for the price of the delivery wagon?

§ 58. Abbott and Green are partners in the practice of dentistry. They also keep a supply of tooth-brushes, tooth-pastes, etc., for sale. Can the firm be held liable on a note given in the firm name by one of the partners?

§ 66. Adams and White are partners in the grocery business. The awning in front of the store is out of order, so that it cannot be lowered without danger to the plate glass window of the adjoining store. Adams, contrary to White's warning, lowers the awning and breaks the window. Is White liable?

§ 71. Addison, a partner in a clothing firm, negligently allows the delivery wagon to get out of repair. In consequence of this, on the following day a wheel breaks and a pedestrian is injured. Addison, who was driving, immediately settles with the injured man. Can he get compensation from his partners?

§ 73. Atwell is a dormant partner. He retires from the firm but gives no notice. Subsequently Mann, who has previously had dealings with the firm, and Drake become creditors of the firm. Is Atwell liable to either?

§ 74. On January 11, 1908, a firm makes a breach of contract. In February, 1908, Moore becomes an ostensible partner. Suit is commenced against the firm in April, 1908. Must Moore be included in the suit?

§ 76. Arnot and Babcock are partners in the bridge building business. The articles provide that upon the death of one of the partners his executor may take his place. Can Arnot's executor be held liable for materials ordered by Babcock after Arnot's death?

§ 79. The firm of Buck & Caton by the partnership articles is to continue five years. At the expiration of this time Buck publishes a notice of the dissolution of the firm in a local paper. Drew, who

has had dealings with the firm, is a subscriber to the paper, but being absent from the city at the time fails to receive the copy with the notice. Later he extends credit to Caton, thinking that he is dealing with the firm of Buck & Caton. Is Buck liable?

§ 82. What is the fundamental principle in the distribution of assets in cases of insolvent partnerships?

§ 85. Adams and Wilson own real estate as partners. Adams is adjudicated a bankrupt. Where is the title to the real estate?

§ 86. All the partners are solvent. Has a court jurisdiction to declare the firm insolvent?

§ 87. What is the law of limited partnerships founded upon?

§ 91. How does a joint stock company resemble a corporation?

APPENDIX B.

PRIVATE CORPORATIONS.

§§ 4, 5. How does a corporation get its power to act as a body? For what purposes may it so act? In what manner must it act?

What is the difference between a primary and a secondary franchise?

§ 6. How early was corporate existence recognized in England?

§ 7. How early was a corporate franchise regarded as a privilege in England?

§ 9. What event in the United States marked the beginning of a rapid increase in the number of corporations? Why?

§ 10. The United States Constitution provides "private property shall not be taken for public use without just compensation." The legislature passes an act condemning for public use a part of the oil fields of a corporation. Is the corporation entitled to compensation?

§ 11. In what respects is a corporation not regarded as a person?

How is the citizenship of a corporation determined?

§ 12. An ordinance provides that the owner of property that has become a nuisance shall be liable to a penalty. The property of the Carter Company, of which Jones is the sole shareholder, has become a nuisance. An action is brought against Jones for the penalty. What decision?

§ 13. Addison and Babcock, partners, make a contract with Smith not to engage in the shoe business. They form a corporation called the Addison Shoe Company, and themselves acquire all the stock. Has Smith any right of action?

§ 14. The legislature grants to a corporation the exclusive right to maintain a foot bridge across the Mississippi River for twenty years. At the end of five years the legislature passes an act declaring that the franchise shall be forfeited unless the corporation also maintains a railroad bridge. Can the state compel the corporation to forfeit its charter if it refuses to build a railroad bridge?

A state levies a tax on corporations of 2 per cent of the value of the franchise. How is the value of the franchise determined?

§ 15. Three shareholders owning all the stock of a banking corporation agree to change the bank into an insurance company. Is such a change lawful? Why not? Suppose the three had been engaged in banking as partners.

What effect has the death of a shareholder upon the existence of a corporation? The death of a partner upon the existence of a partnership?

Where is the title to corporate property? Partnership property?

What are some of the advantages of partnership organization over corporate?

§ 16. Mason, Drew, and two others by agreement form a joint stock company. By the terms of the contract no one member shall be liable for more than one-fourth of the debts. In the absence of statutory authority is such a company lawful? Can Mason be held liable for more than one-fourth of the debts by Adams, a creditor of the company, who has always had full knowledge of the facts?

§ 17. What is the status of an unincorporated society?

§ 18. What is a mining partnership?

§ 19. What is meant by a syndicate?

§ 21. Carter wishes to sue in Indiana a company doing business in Indiana, but organized in Illinois as a joint stock company. How is it determined whether he can sue the company as a corporation? Suppose he sues in Illinois?

§ 22. Is an express company a private, public, or quasi-public corporation?

What is a corporation by estoppel?

§ 23. Does a promoter become a stockholder of the corporation which he promotes? Does a promoter have a vote in the election of the directors and officers?

§ 24. Has a city power to create a banking corporation without the consent of the state?

§ 27. May a manufacturing corporation be created by common law?

§ 28. What is the theory of corporate existence by prescription?

§ 29. Whence do legislative bodies derive the power to create corporations?

§ 31. What are the disadvantages in the creation of corporations by special acts of the legislature?

§ 32. Where there is a general act providing for the creation

of a certain class of corporations, does this take away from the legislature the power to create a corporation of this class by a special act?

§ 33. Need the legislature expressly declare a body to be a corporation in order to make it a corporation?

§ 35. The legislature passes a law providing that any five or more persons by filing with the secretary of state a petition setting forth the objects of the proposed corporation shall receive a certificate from the secretary of state declaring that the statute has been complied with, and shall thereupon become a corporation. Five men comply with these requirements. What is the possible objection to the formation of corporations under such a law?

The legislature passes an act providing that all companies organized under a previous joint stock company act shall become corporations. Is this act valid?

§ 36. May a corporation be created by an act of Congress within a state without the state's consent?

§ 38. Whence do territorial legislatures derive the power to create corporations?

§ 39. Is there any difference between a constitutional provision that there shall be "no special act creating corporations" and a provision that there shall be "no special act conferring corporate powers."

§ 41. What were promoters under a special act of the legislature called? What was their relation to the corporation and subscribers?

§ 42. What are promoters under a general law called? When do their functions cease?

§ 43. In the absence of both a general law and a special law, how may a person become a promoter.

What is meant by underwriting stock of a new corporation? For what purpose is this done?

§ 44. Is a charter a contract or a law?

May a body be sued as a corporation after all the statutory requirements have been complied with, but before the election of officers?

§ 45. The legislature offers a charter for a telegraph corporation to any five or more persons who shall sign articles of association, and within five years construct five hundred miles of telegraph lines. Five persons, without any notice to the legislature, sign articles of association and construct the telegraph lines as specified. Has there been an acceptance of the charter?

§ 46. The general law under which the corporation is created

provides that two-thirds of all the directors shall constitute a quorum. The articles of incorporation say "a majority of all the directors shall constitute a quorum." Can seven out of twelve directors act so as to bind the corporation?

§ 48. What requirement does the general law usually make in regard to the manner of acknowledging the articles of incorporation?

A general law providing for the formation of summer-resort associations provides that each corporation shall have a life of thirty years. The articles of incorporation provide that the asssociation shall have a life of fifty years. What is the effect of this provision in the articles?

§ 49. In X state a corporate franchise is subject to a state tax. Must a company incorporated in Y state and doing business in X pay a tax on its franchise?

§ 50. Mason and White each agree to subscribe for fifty shares of stock in a corporation to be formed. Can White be compelled by Mason to so subscribe? What is the consideration for White's promise?

§ 52. Where a statute provides that subscriptions for stock shall be stated in the articles of incorporation, is a subscription not so stated valid?

§ 53. Babcock agrees to subscribe for fifty shares of stock in a corporation to be formed. After the corporation is formed he refuses. To what extent is he liable to the corporation?

§ 54. Carlson makes an agreement subscribing for stock in a corporation to be formed. The corporation is formed and at a meeting votes to accept all the subscriptions for stock which have been delivered to it. Duncan, who took Carlson's subscription, by mistake has failed to communicate it to the corporation. Before the next meeting Carlson goes to Duncan and says, "I don't want the stock." At the next meeting the corporation votes to accept Carlson's subscription. Is he liable to the corporation for the value of the stock?

§ 55. Burke makes an agreement with Kramer, a promoter, subscribing for one hundred shares of stock in the corporation to be formed. Kramer promises to present the subscription to the corporation and procure its acceptance at the first meeting. Before the first meeting Burke notifies Kramer that he "cancels his subscription." Has Kramer any action against him?

§ 59. A statute provides that a payment of ten dollars on each share subscribed for must be made at the time of the subscription.

Williams subscribes for a share of stock in the X Co., and gives a worthless check for ten dollars. The X Co. brings an action for the full value of the share. What decision?

§ 61. Brown subscribes for fifty shares of stock in the Dudley Company upon condition that the Dudley Company acquire within one month all the property of the Smith Company. At the end of one month the Dudley Company has failed to perform the condition. Brown has made no payments on his subscription. The company brings an action for the amount of the subscription. What decision?

§ 62. Jones delivers his subscription to Carter, a promoter, telling him to deliver it to the corporation only if he gets a subscription from White for fifty shares. Carter fails to get White's subscription but delivers Jones' to the corporation, which accepts it. Has the corporation any action against Jones on the subscription?

§ § 66, 71. The Moore Iron Company has done business for twenty-five years as a corporation. Mason brings an action against the Company as a corporation for a breach of contract. The defense is that the action should have been brought against the members of the company as individuals, since the company is not a corporation, not having filed a copy of the articles of incorporation with the secretary of state, as required by law. What decision?

§ 69. May there be a de facto corporation under an unconstitutional law?

§ § 70, 71. Smith extends credit to the Bacon Shoe Company thinking it to be a corporation. The company has existed as a corporation for several years. Smith later learns that the law under which the company was formed was repealed two days before its organization. Smith brings an action against the members of the company as partners. What decision?

§ 72. May a state always prevent further corporate action by a de facto corporation by means of quo warranto proceedings?

§ 74. John Baldwin, a member of a non-stock company dies. James Baldwin, his only child, claims membership in the company by descent. What decision?

§ 77. Are the directors of a corporation always shareholders?

§ 78. The directors of a corporation actually insolvent, but still a going concern, mortgaged its entire property to secure the payment of notes given for loans to the corporation, which the directors had thus enabled it to obtain. Is this action by the directors valid?

§ 79. At a time when the president is in Europe, the vice-president of a bank orders two directors to hand in their resignations, and

appoints two new directors in their places. Can this action be sustained?

§ 81. The statute under which a corporation is formed provides that the corporation shall be taxed only on its capital stock. Later a tax is levied on the corporate franchise. Has the corporation a defence to an action for the payment of this tax?

§ 84. Is the surplus of a bank a part of its capital or of its capital stock?

§ 85. A bank has a capital stock of $100,000. The entire assets of the bank are $90,000, the debts $5,000. The directors vote a dividend of 2 per cent. Can the creditors of the bank restrain the payment of this dividend?

§ 86. Capital stock, $200,000. Surplus, $50,000. Value of franchise, $20,000. 2,000 shares of stock. What is the par value of the share stock? What is the actual value of the share stock? Of the capital stock?

§ 87. Capital stock $100,000, half 5% preferred and half common. The profits the first year are $2,000. The directors declare a dividend of 4% on the preferred stock. The following year the directors wish to divide all the profits, amounting to $20,000. How should this amount be divided?

§ 88. April 10, 1905, Brown donates ten shares of stock to the corporation. June 1, 1905, this stock is sold by the corporation to Jones at 40% of the par value. Jones claims a dividend of 2%, which was declared May 1, 1905. What decision?

In 1908 the corporation fails and the creditors bring an action against Jones to compel him to pay into the assets 60% of the face value of his stock. What decision?

What is watered stock?

What are fictitious shares?

§ 90. Watson dies intestate possessed of 100 shares of capital stock of the X Land Company. His wife claims an interest in this stock under a statute giving a right of dower to the wife of a decedent in all the realty of which he dies possessed. What decision?

§ 93. The Mississippi Iron Company, incorporated in Iowa but doing business in Illinois, seeks to enjoin an Illinois corporation from using the same name. Can it do so? Would it be otherwise if the corporation had been named the Excelsior Iron Company?

§ 95. Has a corporation power to change its name at will?

§ 96. What is the meaning of perpetual succession?

§ 98. White was not given notice of a shareholders' meeting

in the manner provided by the by-laws. He learned of the meeting, however, from a friend and attended. At the meeting, a resolution to increase the capital stock was passed, White not voting. The following day White complains. Has he any ground for protest?

§ 99. A statute provides that a majority of the shares outstanding shall constitute a quorum. All the shareholders are duly notified. Robinson, who owns a majority of the shares, is the only person to attend. Has he power to act for the corporation?

§ 101. The president of a corporation called on a majority of the directors individually, and they separately authorized the employment of a driver for the corporation's delivery wagon. Is this action binding on the corporation?

A corporation has ten directors. Six attend the directors' meeting. Four vote affirmatively for a resolution and two vote in the negative. The two voting against the resolution own five shares each. Those voting for it own two shares each. Is the resolution carried so as to bind the corporation?

§ 102. Is oral evidence admissable to prove corporate action?

§ 103. A note is signed "H. L. Jenkins, secretary of the Bridgeport Brass Works." Is this note binding on the corporation?

§ 105. Adams and Wilson together own all the stock in a corporation. Adams lends Wilson $1,000, taking a pledge of his stock in the corporation as security for the loan. Wilson fails to pay the debt and Adams forecloses, thus acquiring the stock. Has this any effect on the corporate existence?

An amusement company owns a pavilion in Streator, and agrees with Clark, who is about to open a roller skating rink, never to use its pavilion for roller skating. Afterwards one of the stockholders acquires all the rest of the stock in the company. At a time when no other use can be found for the pavilion, this stockholder takes down the company's sign from the front of the building and opens it in his own name as a roller skating rink, paying the operating expenses out of his own funds. Has Clark any action against the company?

A corporate charter provides that all of the acts of the corporation must be ratified by a board of at least three directors, each of whom must be a shareholder. Peters, who owns all the stock in the corporation, elects himself president and director, and makes a contract in the corporate name. Is the contract valid?

A Kentucky street railway company was required by the statute creating it to operate a certain number of cars a day over its line.

Will an action lie against the company for failure to comply with the statute at a time when all the stock is owned by one man?

§ 106. A manufacturing company makes a contract to build a machine and deliver it at a future day. Before the machine is finished the company is involuntarily dissolved, whereby the completion of the machine is made impossible. Can the buyer recover damages for failure of the company to deliver the machine, and if so, from whom? Would there be any difference in the case of voluntary dissolution?

A creditor has a claim against a corporation for $500. The corporation has personal property worth $600 and is involuntarily dissolved. Has the creditor any right at law against the personal property?

§ 107. A railroad company is incorporated in Indiana and authorized by its charter to maintain a railroad in Indiana. It extends its tracks fifty miles into Illinois. Can the corporation recover from a passenger who has ridden in the company's cars in Illinois without paying fare?

§ 108. A corporation organized "to carry on a general mercantile business," and thereunder conducting a department store operates a bus line between its store and the principal railroad depots, charging a fare of ten cents per person. Has it exceeded its power?

§ 109. By a corporate charter a corporation is given power to maintain a bridge across a river, the franchise to be exclusive within certain territorial limits. Would this charter be construed so as to exclude ferries within the specified limits? What rules would be applied in construing it?

§ 110. A statute limits the amount that may be borrowed by a corporation to $20,000. The corporation borrows $30,000 from Jones, who has knowledge of the statute. It uses $25,000 of this money for the payment of pre-existing debts. How much of the money can Jones recover as against other creditors?

§ 114. The directors authorize the president of a bank to guarantee in the corporate name a note for the accommodation of a friend. Is this action binding on the corporation? Would it be different if the action had been authorized by a majority of the shareholders?

§ 115. Has a corporation power to enter into a partnership?

§ 119. What greater power has the state over corporations than over individuals in respect to punishment for contracts in restraint of trade?

§ 131. In February, 1905, the Hales Bridge Company makes a

breach of its contract with Wilson. In March, 1905, it consolidates with the Robinson Bridge Company, the new company taking this name. In April, 1905, has Wilson any action for the breach of cantract? If so, against whom?

§ 133. Land in Indiana is devised to a corporation authorized to do business in Illinois. Is the devise good? If not, who can complain?

§ 137. A railroad corporation sells all its property to Heflin, who discontinues the railroad and uses the land for private purposes. Has the railroad exceeded its power?

§ 140. Carney, a resident of Illinois, wishes to sue the Arlington Company incorporated in New Jersey, but whose incorporators are all citizens of Illinois. May he sue in the United States courts on the ground of diversity of citizenship?

§ 149. The editorial writer of a newspaper company writes a libel which is printed. Is the corporation liable?

§ 154. In what manner can the state compel a forfeiture of a corporate charter for abuse of the franchise?

§ 162. Are corporations subject to the power of eminent domain?

§ 168. X state taxes a domestic corporation on its entire capital stock. Jones, a shareholder living in Y state, is taxed on the shares he owns. Is this double taxation?

§ 173. Which state has the power to regulate the right of an Indiana corporation to do business in Illinois?

§ 185. The promoters of a railroad hire surveyors to lay out a prospective right of way. Have the surveyors an action against the corporation for their pay?

§ 200. Moore holds a share of stock in trust for Jones. Who has the right to vote?

§ 203. Jackson was the owner of stock and held a certificate in the usual form. This is stolen by Adams, who forges Jackson's indorsement and sells it to Bacon, a bona fide purchaser, to whom the corporation issues a new certificate. Does Bacon become a shareholder?

§ 206. February 1, Smith contracts to sell his share of stock to Jones, the stock to be delivered April 1. On March 1 a dividend is declared, payable May 1. Who is entitled to the dividend?

§ 228. A, B and C located a mine. Then they organized a corporation with a nominal capital of five million dollars. The corporation then bought the mine of A, B and C, giving each one-third of the stock marked "fully paid." The company fails. Have the creditors any action against A, B and C?

APPENDIX C.

PUBLIC SERVICE CORPORATIONS AND CARRIERS.

§ 4. How early in England was the special liability of one engaged in a public profession recognized?

§ 7. What is the reason given by courts for now holding that a common carrier is engaged in public business?

§ 8. If the maintenance of a bridge is held to be a public business, what would be said in regard to the nature of the business of operating a ferry?

§ 12. Is a corporation enjoying a legal monopoly always a public service corporation?

§ 14. Is a corporation enjoying a virtual monopoly necessarily a public service corporation?

§ 16. A municipality grants to a corporation the exclusive privilege of furnishing water to the city. Has the corporation a right to arbitrarily refuse to furnish one man with water?

§ 18. A company is formed for the purpose of furnishing daily stock quotations to stock brokers. Can Jones, not a stock broker, demand the service of this company upon offering to pay the regular charge?

§ 20. Has an express company a right to refuse to carry a box containing dangerous explosives?

§ 27. Is there a duty upon an innkeeper to provide extra accommodations, if possible, when he learns that owing to a fair in a neighboring village, many extra travellers are going to pass his way?

§ 28. May a water company enjoying a special privilege refuse to supply water except during the day?

§ 30. Must a street car company permit a man to ride on the roof of a car, if he so requests, and if the inside of the car is full?

§ 31. An inn has accommodations for one more person. Burke, a traveller, applies for a room. A few minutes later, but before Burke has been admitted, a sick traveller applies. The innkeeper gives the room to the sick traveller and turns Burke away. Has Burke any action against the innkeeper?

§ 32. Is a railroad bound to install the most approved system of signals?

§ 33. Is a gas company bound to manufacture the gas so that it will have a strong odor in order that leaks may quickly be discovered?

§ 40. A telephone company furnishes telephones to patrons residing within two miles of the main exchange at the rate of forty dollars a year. It charges fifty dollars a year for telephones installed outside of the two-mile limit. Is this unjust rate discrimination?

§ 45. Has a gas company a right to require a deposit of two dollars before turning on the gas, this amount to be deducted from the first gas bill?

§ 50. Is an innkeeper bound to take care of a traveller's horse?

§ 52. A railway providing accommodations for dogs in its express cars refuses admittance to a day coach to a traveller with a dog. Has the traveller any action?

§ 59. Has a gas company power to enforce a regulation requiring all consumers to permit an officer of the company to inspect the gas meter on the first day of each month?

§ 60. Has a public service corporation the same right to make contracts as an individual?

§ 65. For a consideration Moore, who is about to ride on a railroad train, makes a contract with the company that he will not hold the company for any injury caused by its negligence. Is this contract binding on Moore?

§ 69. For three successive years a farmer carried a circus outfit from the railroad depot to the place where the show was to be held. Was he a common carrier?

§ 74. A common carrier has possession of Addison's goods in one of its cars on a sidetrack. The journey is not yet ended. During the night lightning strikes a neighboring building not owned by the company and sets it afire. The fire spreads to the car and Addison's goods are destroyed. Can Addison recover from the common carrier?

§ § 90, 92. Is a person riding on a street car, who has intentionally given the conductor a counterfeit nickel, a passenger?